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IN THE

Supreme Court of the United States

IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT, PETITIONER

v.

SIERRA CLUB

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this case are:

(1) whether the Ninth Circuit Court of Appeals' *de novo* review of technical findings of fact made by the Environmental Protection Agency ("EPA") under Section 179B(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7509a(d), in an area of EPA's special expertise, can be reconciled with decisions of this Court and the other federal Circuits; and

(2) whether the Ninth Circuit may rely on that *de novo*, lay interpretation of selected facts to mandate that EPA reclassify the nonattainment area at issue to "serious" nonattainment under CAA Section 179B(d), foreclosing further agency consideration.

RULE 14.1 STATEMENT

Petitioner (intervener below) is Imperial County Air Pollution Control District, a governmental agency created by state statute as the body with primary responsibility for the control of air pollution from all non-motor vehicle sources within Imperial County, California. Respondent here (petitioner below) is Sierra Club. Respondent below was EPA.

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PETITION FOR WRIT OF CERTIORARI

Imperial County Air Pollution Control District ("the District") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. In that decision, the court, in a single paragraph, and based on *de novo* review of a single piece of evidence from a well-supported technical administrative record, rejected EPA's fact findings and substituted its own conclusion that foreign emissions could not possibly have caused two PM-10 NAAQS[1] exceedances of 12 and 25 micrograms per cubic meter of air. The court further remanded with instructions that EPA reclassify Imperial County to "serious" nonattainment, foreclosing additional EPA consideration. The decision directly conflicts with this Court's decisions mandating the highest deference to EPA's technical fact findings. If left in place, it will not only directly conflict with decisions of this Court and every Circuit, but will impose staggering burdens on the County, its economy and tens of thousands of largely low-income residents who rely on that economy for survival.

OPINION AND RULEMAKING BELOW

The court of appeals' opinion, *Sierra Club v. United States Environmental Protection Agency*, is reported at 346 F.3d 955 (9th Cir. 2003). App. 1a-16a. The decision was modified and rehearing was denied on December 18, 2003, and reported as *Sierra Club v. EPA*, 352 F.3d 1186 (9th Cir. 2003). App. 17a-19a. The Ninth Circuit's orders requesting supplemental briefing

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[1] "PM-10" refers to particulate matter of ten microns in diameter or less. "NAAQS" refers to the National Ambient Air Quality Standards.

are reproduced at App. 161a-163a.

The EPA rulemaking at issue was issued in two parts. The final rule was reported at 66 Fed. Reg. 53106 (Oct. 19, 2001). App. 65a-91a. The proposed rule was reported at 66 Fed. Reg. 42187 (Aug. 10, 2001) (App. 20a-47a), and also referenced an August 10, 2001 Technical Support Document prepared by EPA in connection with the proposed rule (App. 48a-64a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals entered judgment on October 9, 2003, and amended that judgment on December 18, 2003. Also on December 18, 2003, the court of appeals denied the District's petition for rehearing, but granted the District's motion to stay the mandate until March 17, 2004, or if a petition for certiorari is filed, until final disposition by this Court. App. 17a-18a.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes involved are 42 U.S.C. §§ 7407(d), 7409(a), 7502(b) & (c), 7509a, 7513, 7513a and 7607. They appear verbatim at App. 118a-160a.

The regulations involved are 40 C.F.R. § 50.6, 66 Fed. Reg. 53106 (Oct. 19, 2001), 66 Fed. Reg. 42187 (Aug. 10, 2001) (and accompanying EPA Technical Support Document) and 59 Fed. Reg. 41998 (Aug. 16, 1994). Section 50.6 of 40 C.F.R. appears verbatim at App. 116a-117a. A verbatim version of the relevant sections in 59 Fed. Reg. 41998 (Aug. 16, 1994) (pages 41998-42002 only) appears at App. 92a-115a. As referenced above, 66 Fed. Reg. 53106 (Oct. 19, 2001), 66

Fed. Reg. 42187 (Aug. 10, 2001) and the Technical Support Document appear verbatim at App. 20a-91a.

STATEMENT OF THE CASE

A. The CAA Provisions at Issue

1. *The Particulate Matter NAAQS*

In 1990, Congress amended the CAA to emphasize states' primary responsibility to regulate sources of air pollution within their borders. Under CAA Section 109(a) (42 U.S.C. § 7409(a)), EPA adopted NAAQS for certain air pollutants, including PM-10. EPA adopted two PM-10 NAAQS: a maximum 24-hour concentration of 150 micrograms per cubic meter ("$\mu g/m^3$") (the "24-Hour Standard") and a maximum annual arithmetic mean concentration of 50 $\mu g/m^3$ (the "Annual Standard"). 40 C.F.R. § 50.6(a), (b). The 24-Hour Standard is attained when the expected number of days per calendar year exceeding that standard is no more than one. *Id.* § 50.6(a). The Annual Standard is attained when the expected annual mean PM-10 concentration is no more than 50 $\mu g/m^3$. *Id.* § 50.6(b). Areas not meeting the PM-10 NAAQS initially (including Imperial County) were designated as "nonattainment" for PM-10 (42 U.S.C. § 7407(d)), and were initially classified as "moderate" PM-10 nonattainment areas (*id.* § 7513(a)).

States with PM-10 nonattainment areas were required to submit to EPA a state implementation plan ("SIP") demonstrating how the state proposes to meet the PM-10 NAAQS by a specified "attainment date." *Id.* §§ 7410(a); 7502(b), (c). The attainment date for moderate PM-10 areas was December 31, 1994. *Id.* § 7513(c)(1). If EPA finds the area failed to attain the PM-10 NAAQS by this attainment date, the area is

subject to reclassification to "serious" PM-10 nonattainment, which requires, among other things, that the area be subject to rigorous and expensive implementation of "best available control measures" for all source categories in the area. *Id.* §§ 7513(b)(2), 7513a(b)(1)(B).

2. *CAA Section 179B*

Congress also determined that nonattainment areas should not be penalized with reclassification if nonattainment is caused by pollution sources outside the United States, codifying this protection in CAA Section 179B, added as part of the 1990 CAA Amendments. *See* 42 U.S.C. § 7509a(d). Section 179B(d) provides:

> Notwithstanding any other provision of law, any State that establishes to the satisfaction of the [EPA] Administrator that, with respect to a PM-10 nonattainment area in such state, such State would have attained the [PM-10 NAAQS] by the applicable attainment date, but for emissions emanating from outside the United States, shall not be subject to the provisions of section 7513(b)(2) of this title [mandating reclassification of area].

Thus, Section 179B invests EPA with sole responsibility to evaluate and address the impacts and domestic consequences of cross-border pollution, and prohibits reclassification if EPA finds nonattainment is due to cross-border impacts.

The legislative history indicates that Congress was well aware of the chronic cross-border pollution

impacting U.S. border areas, including Imperial County. *See* H.R. Rep. No. 490(I), 101st Cong., 2d Sess. 262-70 (1990) (recognizing "problem" of "transboundary emissions" in four border areas: Douglas, Arizona; Calexico, California [in Imperial County]; Nogales, Arizona; and El Paso, Texas). Congress adopted Section 179B(d) specifically to give EPA the flexibility and sole authority to address threats to attainment status posed by cross-border pollution. *Id.*

3. *EPA Guidance on Section 179B*

EPA promulgated regulations regarding the types and amount of evidence sufficient to satisfy EPA that, but for foreign emissions, a PM-10 nonattainment area would have timely attained the PM-10 NAAQS. *See* 59 Fed. Reg. 41998, 42000-02 (Aug. 16, 1994) ("Section 179B Guidance" or "Guidance") [App. 92a-115a].

The Section 179B Guidance provided that "*[s]everal* types of information may be used to evaluate the impact of emissions emanating from outside the U.S." App. 104a (emphasis added). EPA outlined five examples of such information: (1) comparing PM-10 monitoring readings with wind and other meteorological data, (2) showing that reasonably controlled U.S.-side PM-10 emissions do not cause NAAQS exceedances, (3) analysis of ambient PM-10 sample filters, (4) comparison of the magnitude of U.S. and foreign PM-10 emissions sources, and (5) air dispersion and/or receptor modeling to compare U.S. and foreign emission impacts. App. 104a-105a

The Guidance notes that these example methods are neither required nor exclusive, and one category of information is not superior to another. "The State may

use one or more of these types of information or other techniques, depending on their feasibility and applicability, to evaluate the impact of emissions emanating from outside the U.S. on the nonattainment area." App. 104a. EPA considers this information on a case-by-case basis in determining whether the protections of Section 179B should apply. *Id.*

B. Cross-Border Pollution in Imperial County

Imperial County is a rural county with a population of over 142,000, located in the southeastern corner of California. App. 2a-3a. The District has primary responsibility for regulating air pollution from stationary sources in Imperial County. App. 3a. As the District explained in its brief to the Ninth Circuit below, agriculture comprises the majority of the County's non-governmental economy, and the County's residents – 65% of whom are minorities and nearly a quarter of whom live below the poverty line – depend heavily on this agricultural industry for their livelihood.

The County shares over 80 miles of its border with Mexico, and directly adjoins the highly urbanized city of Mexicali, Mexico – a densely populated metropolitan area of nearly one million people. ER 88.[2] Because of this proximity, as Congress itself recognized, Imperial County regularly receives massive amounts of pollution from Mexican sources. App. 29a-30a. The magnitude of cross-boundary PM-10 transport is undeniable. In Mexicali alone – a city covering only 200 square miles – PM-10 emissions are at least 11 tons

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[2] "ER" refers to Petitioner's Excerpts of Record in the matter below.

per day greater than *all* PM-10 emissions over the entire 4,060 square mile area of Imperial County. App. 29-30a, 79a. This equates to an emissions density 20 times greater in Mexicali than in all of Imperial County. Prevailing wind and vehicle traffic patterns near the border combine to transport these PM-10 emissions from Mexicali into Imperial County. ER 99-105.

While the existence of the cross-border emissions problem is not seriously disputed, precisely quantifying the scope of this problem has proved daunting. For the past decade, the District has worked with EPA, the California Air Resources Board ("CARB") and Mexican authorities in an attempt to inventory emissions sources on both sides of the border, quantify cross-border emissions, and implement appropriate controls. *See* ER 90-92, 98. However, the historical data are incomplete, and gathering information on Mexican emissions sources has required sensitive diplomatic negotiations between EPA and Mexican agencies to obtain reliable data. *Id.* The District conducted additional technical analyses to supplement the incomplete data from Mexico, to better document the fact that the County would have attained the PM-10 NAAQS by December 31, 1994 but for PM-10 influence from Mexico. ER 88, 90-92, 98.

C. EPA's Section 179B Finding

In September 2000, Sierra Club filed suit seeking to compel EPA to reclassify Imperial County to "serious" PM-10 nonattainment. App. 6a. Under a settlement agreement between EPA and Sierra Club, EPA agreed to take one of three actions by October 9, 2001: find the County to be in PM-10 attainment, reclassify the County to "serious" PM-10

nonattainment, or find under CAA Section 179B that the County would have attained the PM-10 NAAQS by the December 31, 1994 attainment date but for emissions emanating from Mexico. *Id.*

In July 2001, the District and CARB submitted to EPA the "Imperial County PM-10 Attainment Demonstration" ("Demonstration"), documenting that the County would have timely reached PM-10 attainment but for Mexican emissions. *See* ER 85-134; Supp. ER 19-108.[3] The Demonstration addressed the seven days during the statutory attainment period (1992-1994) with recorded exceedances of the 24-Hour Standard, as measured at various monitoring locations in Imperial County.[4] *Id.* These exceedances were relatively slight; except for a reading of 258 $\mu g/m^3$ on August 6, 1994, all of the exceedances were within 3-32 micrograms of the Standard. App. 53a-59a. The Demonstration documented, based on *multiple* types of evidence, that none of the measured exceedances would have occurred but for the influence of transborder PM-10 emissions from Mexico. *See* App. 24a-33a, 48-64a; ER 105-07.

EPA carefully reviewed the Demonstration and other supporting data submitted by the District,

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[3] "Supp. ER" refers to EPA's Supplemental Excerpts of Record below.

[4] The recorded exceedances of the 24-Hour Standard (150 $\mu g/m^3$) were on January 19, 1993 (162 $\mu g/m^3$ at the Brawley monitor); January 25, 1993 (175 $\mu g/m^3$ at Brawley); August 23, 1993 (166 $\mu g/m^3$ at El Centro); July 7, 1994 (165 $\mu g/m^3$ at Calexico-Grant St.); August 6, 1994 (258 $\mu g/m^3$ at Calexico-Ethel St. and 182 $\mu g/m^3$ at Calexico-Grant St.); October 17, 1994 (159 $\mu g/m^3$ at Calexico-Grant St.); and December 16, 1994 (153 $\mu g/m^3$ at Calexico-Ethel St.). *See* App. 53a-59a.

separately analyzing and addressing each of the seven exceedance days. App. 24a-33a, 48-64a. On August 10, 2001, EPA found under CAA Section 179B that the Demonstration adequately established none of the 1992-1994 exceedances would have occurred but for emissions from Mexico. App. 24a-25a. However, to allow for the possibility that public comments could persuade EPA to change its mind, EPA invited public comment on two alternative proposed findings: (a) a finding of PM-10 nonattainment and reclassification to "serious," or (b) a finding under that the County would have timely attained the PM-10 NAAQS but for emissions emanating from Mexico. *See* App. 20a-64a (the "Proposed Finding"). In the Proposed Finding, EPA applied the Section 179B Guidance and found that the Demonstration contained sufficient evidence under Methods 1, 4 and 5 to support a finding that none of the seven exceedances would have occurred but for the influence of Mexican emissions. App. 24a-33a.

During the public comment period, the District provided further evidence that each exceedance would not have occurred but for transborder emissions. *See* District's "Comments on Proposed Finding of Attainment in Imperial County, CA But For Foreign Emissions" ("District Comments") (incorporated into the administrative record at ER 191). The additional data showed that the January 19 and 25, 1993 exceedances were the only recorded PM-10 exceedances ever occurring in the wet winter months (Nov.-Feb.) in eight years of monitoring in Imperial County. *Id.* at 12-17. The data also documented that extremely heavy rainfall in the County immediately before the January 19 and 25 exceedances would have suppressed local PM-10 sources to such an extent that

they could not have caused the exceedances, and that the numbers either were monitoring errors or were due to cross-border emissions. *Id.*

On October 19, 2001, EPA issued its final rule finding that the record adequately demonstrated that, but for emissions from Mexico, Imperial County would have timely attained the PM-10 NAAQS. App. 65a-91a (the "Finding"). All of the public commenters supported the Finding except for Sierra Club. App. 69a. Even so, EPA fully considered and rejected Sierra Club's argument that the evidence was inadequate to support the Finding as it applied to the January 19 and 25, 1993 exceedances. App. 69a-82a.

D. The Decision Below

Sierra Club petitioned the Ninth Circuit to overturn the Finding, repeating its argument that the evidence was insufficient to support the Finding. App. 8a, 10a-11a. After oral argument, the court ordered supplemental briefing on, among other things, whether the January 19 and 25, 1993 exceedances would not have occurred but for influence from cross-border emissions. App. 11a-12a. Sierra Club alleged that westerly and west-southwesterly components in windroses for these days foreclosed any possibility that transborder emissions influence could have caused the measured exceedances. App. 10-12a. EPA and the District countered that the variable near-border winds on those days also showed clear components from the southern half of the compass, and that when the available wind data was read together with the rest of the evidence, the totality of evidence adequately supported EPA's Finding that these slight exceedances would not have occurred but for emissions from Mexico.

See App. 12a.

The court reversed and remanded EPA's Finding with directions to reclassify Imperial County as a "serious" nonattainment area. App. 12a-14a. While it purported to recognize that a deferential standard of review was required, the court actually applied a selective, *de novo* review of the January 19 and 25, 1993 exceedances. *See* App. 12a-13a. The court focused only on windrose data, failing to cite any of the other evidence in the record (*e.g.*, windspeed, rainfall, geographic characteristics of county, magnitude of PM-10 emissions, slight magnitude of the exceedances, etc.) bearing on whether the exceedances on January 19 and 25 would have occurred without influence from Mexican emissions. *Id.*

The court supplanted EPA's assessment of the data with its own lay analysis, concluding that "EPA's notion of what constitutes a southerly wind in the windroses is, at the least, expansive and, at most, positively incorrect." App. at 12a. The court further asserted, without explanation, that such winds "of the west-southwesterly variety . . . do[] not support the theory of transport from Mexico." App. 13a. Concluding that the Finding "[ran] counter to the evidence" before EPA, the court observed that, based on its own assessment of "the data and reports in the record, there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedances on January 19 and 25." *Id.* The court then ordered that the case be remanded to EPA with instructions to reclassify Imperial County as a "serious" nonattainment area. App. 14a.

The District petitioned for rehearing and moved to stay the mandate pending filing of this petition. The court of appeals denied rehearing, but granted the motion for stay. App. 18a-19a.

REASONS FOR GRANTING THE PETITION

Summary of Argument

1. The decision below is an abrupt departure from decisions of this Court and the federal Circuits regarding the scope of review of EPA technical findings within its special expertise. By substituting its own lay "fact-finding" for a critical decision entrusted to EPA's technical expertise, the Ninth Circuit fashioned a new doctrine that would allow courts to hand-pick selected data from an agency rulemaking record, disregard the agency's findings and apply a *de novo* interpretation of the data in a context divorced from the agency's detailed and nuanced review. This doctrine cannot coexist with the decisions of this Court and the federal Circuits.

This is a case of first impression in a sensitive area of the CAA defining EPA's authority to evaluate the domestic impacts of foreign pollution. CAA Section 179B(d) strikes a delicate balance among federal regulation of ambient air, state implementation of the federal scheme, and international coordination regarding the transport of air pollutants. It requires highly complex scientific review of the available, often incomplete data sets and the application of EPA's technical expertise as to the probable source of ambient air pollution near the border.

The decision below is flatly inconsistent with the plain language of Section 179B. Section 179B(d) specifies the highest possible level of flexibility and

discretion for EPA; a state need only prove "to the satisfaction of the [EPA] Administrator" that nonattainment was caused by transborder influence. 42 U.S.C. § 7509a(d). Instead, the decision below gives only lip-service to deferential judicial review, and effectively rewrites Section 179B(d) to force states to predict what evidence a reviewing court (using a lay analysis) would require to show that nonattainment is due to transborder emissions. This renders EPA's review and consideration irrelevant, and upends the spirit and letter of Section 179B.

These are recurring issues of national importance, impacting every federal agency with delegated authority to make discretionary determinations within their specialized expertise. This Court should grant certiorari to preserve the independence of EPA and other agencies to make expert decisions without unwarranted judicial interference.

2. This Court and the federal Circuits have long held that, when a reviewing court vacates an agency decision on the grounds that it is not rationally supported by the record, the decision should be remanded for further proceedings at the agency level. This rule respects the agency's role as fact finder and gives it an opportunity to evaluate the evidence in support of its action, or to modify its decision to conform to the evidence.

In conflict with this precedent, the Ninth Circuit instead remanded with instructions for EPA to adopt a rule reclassifying Imperial County to "serious" nonattainment, based on the court's incorrect *de novo* conclusion that "there simply is no possibility that

Mexican transport could have caused the observed PM-10 exceedances on January 19 and 25." App. 13a. Thus, the court compounded its factual error by denying EPA any further opportunity to address the matter. This was wrong as a matter of law, and it imposed staggering and unacceptable burdens on the County and District.

Again, this decision implicates recurring and important issues; it threatens the traditional authority of EPA and other federal agencies to make factual findings and policy decisions delegated by Congress to the agency's expertise.

I. THE COURT SHOULD GRANT CERTIORARI TO CONFIRM THE CORRECT STANDARD OF REVIEW OF TECHNICAL DECISIONS ENTRUSTED TO EPA'S EXPERTISE UNDER CAA SECTION 179B

The Ninth Circuit's *de novo* assessment of the technical meaning of the January 19 and 25, 1993 data, divorced from the rest of the administrative record, directly conflicts with decisions of this Court and the federal Circuits on the broad judicial deference to which expert agency decisions are entitled. These decisions are uniform: discretionary agency decisions made within the agency's special technical expertise are entitled to the *highest* level of deference by reviewing courts. They may not be discarded in favor of the court's lay conclusions. This should be particularly so where, as here, the underlying statute makes clear Congress' intent to empower the agency with the broadest discretion in an area.

The plain words and the legislative history of CAA Section 179B mandate maximum flexibility for

EPA to address nonattainment issues in the sensitive context of international emissions impacts. The decision below would eliminate this flexibility and rewrite Section 179B to allow *de novo* judicial review of the facts. Legitimate EPA policy choices, made after careful consideration of complex and incomplete information, could be undone by a circuit court sitting as a super-agency with its own technical interpretations of the facts and opinions about cross-border emission impacts.

A. This Court and the Federal Circuits Accord the Highest Level of Deference to Agency Decisions Involving Technical Findings of Fact Within the Agency's Special Expertise

Sixty years of this Court's jurisprudence leave no question that agency actions on matters entrusted by law to its discretion are entitled to substantial deference by a reviewing court. *See* 5 U.S.C. § 706(2)(A) (agency decision may be reversed only if arbitrary, capricious or not in accordance with law); *see also United States Postal Service v. Gregory*, 534 U.S. 1, 7 (2001); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989); *Federal Power Comm'n v. Florida Power & Light Co. ("FPC")*, 404 U.S. 453, 463 (1972); *Citizens to Preserve Overton Park v. Volpe ("Overton")*, 401 U.S. 402, 416 (1971); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). A discretionary EPA rulemaking action under 42 U.S.C. Section 7607(b)(1) is among those actions entitled to judicial deference; it may be vacated only if "arbitrary, capricious, or contrary to law or if it exceeds the statutory jurisdiction, authority, or limitations." *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000).

In reviewing whether an agency's decision is "arbitrary or capricious," a court may not reweigh the facts and come to its own conclusions. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983). "It is not our task to determine what decision we, [in the agency's position], would have reached. Our only task is to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas*, 462 U.S. at 105.

Moreover, an agency's scientific determinations within its special area of expertise receive the absolute *highest* level of deference.[5] *See Marsh*, 490 U.S. at 377; *Baltimore Gas*, 462 U.S. at 103; *FPC*, 404 U.S. at 463.

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[5] Decisions from every Circuit facing the issue are in accord on granting this extreme deference to EPA's technical findings within its expertise. *See, e.g., City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003) ("[W]e will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." (internal quotation marks omitted)); *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 604 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *NRDC v. Muszynski*, 268 F.3d 91, 101 (2d Cir. 2001); *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 117-18 (3d Cir. 1997); *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 236-37 (4th Cir. 2001); *BCCA Appeal Group v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003); *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 792 (6th Cir 1995); *New York v. EPA*, 716 F.2d 440, 444 (7th Cir. 1983); *U.S. v. BP Amoco Oil PLC*, 277 F.3d 1012, 1019 (8th Cir. 2002), *cert. denied, Dico, Inc. v. U.S.*, 537 U.S. 942 (2002); *Davis v. EPA*, 348 F.3d 772, 781 (9th Cir. 2003); *City of Albuquerque v. Browner*, 97 F.3d 415, 427 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997). *Accord Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1582-83 (11th Cir. 1986) (deference to FDIC Board); *Goodyear Tire & Rubber Co. v.*

In *FPC*, the Court advised reviewing courts to accord maximum deference to such expert technical decisions:

> A court must be reluctant to reverse results supported by such a weight of considered and carefully articulated expert opinion. Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.

Id. at 463; *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir.) (court reviews an agency's scientific judgments "not as the chemist, biologist, or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."), *cert. denied*, 426 U.S. 941 (1976).

Dept. of Energy, 118 F.3d 1531, 1536 (Fed. Cir. 1997) (to Dept. of Energy).

B. The Plain Language and Subject Matter of CAA Section 179B Require the Greatest Deference to EPA Findings on Nonattainment Caused By Transborder Emissions

In addition to this extremely high level of deference to technical findings of agencies, the plain language of Section 179B itself requires still *further* deference to EPA attainment determinations involving evaluation of international emissions impacts. Section 179B provides that the evidence need only show "to the satisfaction of the Administrator" that the area would have timely attained the NAAQS but for foreign emissions. 42 U.S.C. § 7509a(d).

The justification for this enhanced level of agency discretion is clear from the legislative history of Section 179B. Congress recognized that a finding of attainment "but for" foreign emissions is more than a bare technical decision; it also involves both a domestic and foreign policy judgment as to whether U.S. areas will be required to take strict measures to address near-border pollution not originating from those areas. Senator Gramm, one of the sponsors of the amendment adding Section 179B, emphasized that the amendment was intended to ensure that EPA retained responsibility for addressing international pollution, and that it would have the flexibility necessary to do so:

> [Cross-border pollution] is an international problem that has to be dealt with separately . . . [States] will have an opportunity to come to EPA and say that they are in compliance in terms of their emissions, that their failure to meet the overall standards is due to something that

> is happening in a sovereign foreign country over which they exercise no control. This amendment will give EPA the flexibility to address that problem.

136 Cong. Rec. S2584, S2587 (daily ed. Mar. 9, 1990) (statement of Sen. Gramm).

Section 179B reflects Congress' intent to provide EPA this maximum flexibility. By permitting EPA to act on evidence establishing to its "satisfaction" that nonattainment is caused by transborder emissions, Section 179B plainly invests EPA with the greatest possible discretion to assess such evidence and make the technical conclusions that flow from it.

Indeed, EPA decisions under Section 179B necessarily involve an added layer of complexity, in that they occur at the intersection of domestic environmental policy and international relations, areas in which this Court has accorded the greatest deference to federal agencies. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Allowing a reviewing court to make its own lay assessments of selected data concerning international emissions impacts would thwart Congress' intent and ignore Section 179B(d)'s plain language.

C. The Court of Appeals Was Required to Consider the Entire Administrative Record to Determine if the Finding Was Adequately Supported

Finally, it is equally clear that a reviewing court must look at the *entire* administrative record before determining whether the agency's decision is supported by the evidence. *See* 5 U.S.C. § 506 (in determining whether agency action is "arbitrary" or "capricious"

under Administrative Procedure Act, court must "review the whole record or those parts of it cited by a party."); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (reviewing courts must look at "the record in its entirety" that was before the agency before determining that the evidence did not support the agency's decision).

A reviewing court acts contrary to law when – as the Ninth Circuit did here – it invalidates an agency action based only on a review of selected facts in the record, and fails to consider the entire record and *all* facts therein supporting the agency's decision.

D. The Ninth Circuit Failed to Apply the Required Deference, But Instead Conducted *De Novo* Review of Selected Facts

The Ninth Circuit contravened this Court's decisions discussed above. The court went far beyond its legal mandate to verify whether the record reflected "a rational connection between the facts found and the choice made." *See Baltimore Gas*, 462 U.S. at 105. Instead, the court openly substituted its own judgment for EPA's well-considered technical determination on the meaning and weight of windrose data for the January 19 and 25, 1993 exceedances.

In making the Section 179B Finding, EPA did not make a snap judgment based only on one type of data; it followed carefully considered EPA guidance concerning several types of evidence to be considered in such analyses. This Section 179B Guidance is itself the product of substantial agency expertise in evaluating complex matters of international emissions, and is entitled to substantial deference by reviewing

courts under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

The Ninth Circuit ignored *Chevron* by disregarding EPA's finding that the Attainment Demonstration provided substantial supporting data under three of the five example methods in the Section 179B Guidance. Instead, its sole ground for reversing the Finding is that it "runs counter to the evidence" of January 19 and 25 windroses showing mixed northwest, west and southwesterly wind components.[6] App. 12a. The court simply disagreed with EPA's technical determination that the mixed winds on those days evidenced sufficient southerly components to contribute to cross-border PM-10 transport, determining instead that "EPA's notion of what constitutes a southerly wind in the windroses is, at the least, expansive and, at most, positively incorrect." *Id.* The court concluded, without further discussion, that a "'southerly component' of the west-southwesterly variety . . . does not support the theory of transport

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[6] The only other record evidence even cited by the court is data proffered by Sierra Club that, on January 19 and 25, "monitors south of Brawley (and thus closer to the border with Mexico) recorded significantly lower levels of PM-10 than those recorded at Brawley." App. 10a-11a. The court does not state whether it relied on this data in reversing EPA's Section 179B Finding. In any event, the court fails to acknowledge (as EPA did) that not only was this data outdated, but that other monitoring data south of Brawley for the same time frame indicated PM-10 levels as high or higher than those at Brawley, supporting the view that significant PM-10 was being transported from Mexicali. *See* ER 62 (1997 Transport Study data relied upon by Sierra Club), App. 76a-78a (noting that EPA considered 1997 Transport Study, but that data submitted in State's Attainment Demonstration was more up-to-date and reliable).

from Mexico." App. 13a.

The court then swept away hundreds of pages of supporting evidence in EPA's administrative record by concluding that "there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedances on January 19 and 25." *Id.* Not surprisingly, the court's truncated analysis of a complex record resulted in error. More importantly, the court ignored EPA's reasonable assessment of the *entire body* of technical evidence in the record, including notable areas of data discussed below.

1. *The Windrose Data*

First, the court ignored the critical factor of wind "stagnancy" on the January 19 and 25 exceedance days, and did not apply (as EPA did) the type of nuanced pollutant transport analysis required whenever "stagnant" winds are involved. EPA recognized that characterization of wind speed and direction becomes highly complex when winds are "stagnant." "Stagnant" does not mean that winds are absent, but that wind speeds average less than 3.2 m/s. *See* ER 103-04. In such conditions, wind "drift" is difficult to measure, and windroses by themselves may not provide reliable information on PM-10 transport. *See* ER 104. When winds are "stagnant," additional data are required to reliably predict PM-10 transport.[7] ER 103-04.

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[7] The court also failed to discuss the other windroses in the record, documenting that winds in Imperial County generally prevail from the south. *See* Supp. ER 20, 30, 40, 51, 61, 71, 81, 91, 101. These windroses show that Mexican PM-10 emissions can drift across the border and build up in Imperial County over *multiple* days, including the days before the January 19 and 25 exceedances.

Unlike the court of appeals, EPA fully considered the issue of wind "stagnancy" on the January 19 and 25 exceedance days. App. 53a-56a. EPA acknowledged that such stagnant winds were, by definition, "ill defined" and needed to be analyzed in the context of other information in the record. *Id.* Despite these inherent limitations, EPA recognized that the available data did indicate some flow from the southern half of the compass at least 14 of the 24 hours on each day. *Id.*

For these reasons, while recognizing the inherent uncertainty involved with such low speed winds, EPA reasonably concluded that the windrose evidence for the January 19 and 25 exceedance days tended to support the theory that some PM-10 emissions measured in Imperial County on those days originated from Mexico, and that, taken in context, the amount of such emissions likely was enough to cause the slight PM-10 exceedances on those days. *Id.*

2. *Rainfall Data and Receptor Modeling*

The court of appeals also failed to consider the rainfall data in the record for January 1993. In that month, Imperial County received the highest monthly rainfall *ever* recorded (over 3.4 inches). *See* District's Comments at 12-13, 29. Indeed, the heaviest rainstorm of the year soaked the ground throughout Imperial County through January 18, 1993 – immediately before the January 19 and 25 exceedances. *See id.* at 12-13, 29, 35-43. All of this data was incorporated into the administrative record. ER 191.

This data indicates that local "dry ground" sources of PM-10 in Brawley – the source of the vast majority of locally-generated PM-10 (*see* ER 88-89) –

would have been *suppressed* on January 19 and 25th due to the soaked ground. However, the soaked ground would *not* have suppressed many of the major sources of PM-10 in Mexicali, including tire-burning, "black smoke" emissions from Mexicali kilns, smokestack emissions from uncontrolled industrial sources, and vehicular combustion of high-sulfur diesel fuel in and around Mexicali. *See* Supp. ER at 7-8, 13-15. The court's opinion ignores this rainfall evidence – evidence incorporated into the record and further supporting EPA's Finding.

3. *Windfield Data*

The Opinion also ignores windfield evidence indicating that winds in and immediately around Brawley on January 25, 1993 were light and variable with southwesterly components for a significant part of the day. ER 125-27. The January 25 windfields show that winds throughout the day were light and had predominantly southwesterly and west-southwesterly components. ER 124-26. EPA correctly interpreted these windfields as suggesting "stagnant conditions with winds ill defined," but providing sufficient additional evidence of "some southerly flow" of PM-10 emissions from Mexico. App. 54a-56a.

4. *Proximity, Magnitude and Density of Mexicali PM-10 Emissions vs. Slight Exceedances of NAAQS*

Finally, the slight measured exceedances of the 150 $\mu g/m^3$ standard on January 19 and 25, 1993 (162 and 175 $\mu g/m^3$) mean that very little influence from Mexican emissions was required to push otherwise compliant PM-10 readings over the 24-hour PM-10 NAAQS. As discussed above, it is undisputed that the magnitude

and density of PM-10 emissions in adjacent Mexicali are far higher than in all of Imperial County. App. 29a-30a. The totality of evidence in the record for all exceedance days shows a clear pattern of cross-border transport of these massive PM-10 emissions.

EPA properly relied on this gross disparity in emissions magnitude and density, and the proximity of these emissions to the County, as still further evidence to support the Finding. *Id.* The Ninth Circuit improperly second-guessed that judgment.

E. The Ninth Circuit's Decision Threatens Recurring Conflicts on the Scope of Deference to Expert Agency Findings, an Issue of National Importance

While the conflict with this Court and the federal Circuits alone warrants certiorari, the recurring conflicts the Ninth Circuit's decision will cause in the area of judicial deference to agency decisions only enhance the need for review. This Court has applied the same deference to other agencies' expert decisions where the administrative record contains mixed facts. *See, e.g., Marsh*, 490 U.S. at 377 [Army Corps of Engineers]; *Baltimore Gas*, 462 U.S. at 105 [Nuclear Regulatory Comm.]; *FPC*, 404 U.S. at 463 [Federal Power Comm.]; *see also FCC v. Nat. Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978) ("[C]omplete factual support in the record for the [FCC's] judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'") (internal citation omitted).

Deference to agency expertise not only underlies this Court's decisions on the review of agency

rulemaking, but also forms the backbone of its agency deference jurisprudence under *Chevron*. *See, e.g.*, *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference.") Allowing the decision below to stand would pose a grave threat to decades of jurisprudence founded on the basic principle of judicial respect for agency expertise.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE CIRCUMSTANCES UNDER WHICH DISCRETIONARY, TECHNICAL AGENCY DECISIONS MAY BE REMANDED WITH INSTRUCTIONS FOR THE AGENCY TO ENTER A NEW SUBSTANTIVE DECISION.

After incurring three summary reversals from this Court for violating the traditional rule of agency remand in the immigration context,[8] the Ninth Circuit now threatens to spread this error to a new area of administrative law. As discussed above, the Ninth Circuit incorrectly concluded that the Finding was "without substantial basis in fact." But even if the court thought the evidence in the record was inadequate, it was not empowered to remand with

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[8] *See INS v. Chen*, 537 U.S. 1016 (2002) (reversing Ninth Circuit for failing to remand to Board of Immigration Appeals and for substituting its own factual conclusions for those of Board); *INS v. Ventura*, 537 U.S. 12 (2002) (same); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (same); *see also Jahed v. INS*, 356 F.3d 991, 1002 (9th Cir. 2004) (Kozinski, J, dissenting) ("[O]ur court seems bent on denying the BIA the deference a reviewing court owes an administrative agency. Instead, my colleagues prefer to tinker – to do the job of the Immigration Judge and the BIA, rather than their own.")

instructions for EPA to reclassify Imperial County to "serious" nonattainment. The court was required to remand the case to EPA for further EPA consideration consistent with the court's opinion. Its failure to do so not only constitutes reversible error, but threatens the consistent application of this Court's jurisprudence on remand.

This Court has held that if a reviewing court finds:

> the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); *see also LTV Corp.*, 496 U.S. at 654 (remand "is the preferred course" if record deemed inadequate to support decision); *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (if record failed to explain agency action sufficiently, remedy is not to hold *de novo* hearing but to remand to obtain from the agency additional explanation.) This rule flows from traditional considerations of according respect to the agency as the fact finder and sole entity authorized by statute to make the substantive policy decision involved. *See Chenery*, 318 U.S. at 88 ("a judicial judgment cannot be made to do service for an administrative judgment . . . an appellate court cannot intrude upon the domain

which Congress has exclusively entrusted to an administrative agency.")[9]

Less than two years ago, in *INS v. Ventura*, 537 U.S. 12, 17-18 (2002), this Court summarily reversed the Ninth Circuit in similar circumstances when it failed to remand an asylum matter to the Board of Immigration Appeals, but instead decided the case *de novo* in the asylum applicant's favor based on its own substantive evaluation of the evidence. The Court stressed the importance of remanding for further agency proceedings

> a matter that statutes place primarily in agency hands . . . The agency can bring its expertise to bear on the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.

Ventura, 537 U.S. at 16-17. The Ninth Circuit's conclusion that the evidence "compelled" its finding for the applicant was legally inadequate because the record

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[9] Other federal circuits have echoed this long-held requirement to remand agency actions deemed lacking in evidentiary support. *See, e.g., County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011-12 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000); *Seavey v. Barnhart*, 276 F.3d 1, 12 (1st Cir. 2001); *Ward v. Brown*, 22 F.3d 516, 522-23 (2d Cir. 1994); *Dia v. Ashcroft*, 353 F.3d 228, 260 (3d Cir. 2003); *West Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 248-49 (4th Cir. 2003); *Kroger Co. v. Regional Airport Auth. of Louisville and Jefferson County*, 286 F.3d 382, 387 (6th Cir. 2002); *Mickeviciute v. INS*, 327 F.3d 1159, 1164-65 (10th Cir. 2003).

was "at most, ambiguous about the [factual] matter" at issue, and because remand would allow further development of the record by the agency. *Id.* at 17-18.

The decision below repeats the Ninth Circuit's error in *Ventura*. The remand with instructions here dictates, by judicial fiat, a substantive outcome on a policy decision entrusted solely to EPA's expertise. The substantial amount of evidence in the record, apart from just the windroses, makes the record "at most, ambiguous" about whether the January 19 and 25 exceedances would not have occurred but for Mexican emissions. That ambiguity may be resolved only by remand and further development of the record by EPA.

The cases cited by the Ninth Circuit do not support remand with instructions here. *See Alvarado Cmty. Hosp. v. Shalala*, 155 F.3d 1115, 1125 (9th Cir. 1998), *as amended*, 166 F.3d 950 (9th Cir. 1999) (remanding with instructions to consider new data, not dictating a substantive result); *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996) (in cases concerning social security benefits, court has discretion to remand, or to award benefits if the record is fully developed and further proceedings would serve no useful purpose); *Sierra Club v. EPA*, 311 F.3d 853 (7th Cir. 2002) (remanding with instructions where EPA lacked authority to grant attainment date extension, without any dispute over record evidence or discussion of the remand issue itself).

Not one of these cases involves any "rare circumstance" approximating the facts of this case. Indeed, the only "rare circumstance" cited by the court as justifying remand with instructions is the court's *de novo* factual finding on the windrose data and its

assertion that "the record here has been fully developed, and the conclusions that must follow from it are clear." App. 13a-14a. But as discussed above, the totality of record evidence – beyond windroses alone – more than adequately supports EPA's expert decision that Mexican PM-10 emissions provided *at least* that small amount of influence necessary to cause the slight exceedances observed.

Thus, the court rationale for remanding with instructions is mistaken about the standard and the evidence. There is no "rare circumstance" justifying remand with instructions here. This Court should grant certiorari to clarify quickly and decisively that a reviewing court cannot make its own *de novo* decisions about the meaning of technical evidence within an agency's expertise, then parlay that improper *de novo* decision into a "rare circumstance" justifying remand with instructions for the agency to reach a substantive policy decision otherwise entrusted to its discretion.

CONCLUSION

For the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted

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(Any footnotes trail end of each document)

No. 01-71902

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB,
Petitioner,

IMPERIAL COUNTY AIR
POLLUTION CONTROL DISTRICT,
Intervenor,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; MICHAEL O. LEAVITT,
Respondents.

October 9, 2003, Resubmitted
October 9, 2003, Filed

COUNSEL: David S. Baron, Earthjustice Legal Defense Fund, Washington, D.C., argued the cause for petitioner Sierra Club and submitted briefs.

Thomas H. Pacheco, United States Department of Justice, San Francisco, California, argued the cause for respondent Environmental Protection Agency and submitted briefs. Thomas L. Sansonetti, Assistant Attorney General, Jan Taradash, Associate Regional Counsel, Environmental Protection Agency, and Geoffrey Wilcox also were on the briefs.

Rick R. Rothman, McCutheon, Doyle, Brown & Enersen, LLP, Los Angeles, California, argued the cause for intervenor Imperial County Air Pollution Control District and submitted briefs. William H. Freedman and Michael S. McDonough also were on the briefs.

Michael S. Rhodes, Colley Godward LLP, San Diego, California, filed a brief on behalf of amicus curiae American Lung Association of San Diego and Imperial Counties. Andrea S. Hoffman, Robert R. Veith, and Craig A. Guthery also were on the brief.

JUDGES: Before: William C. Canby, Jr., Diarmuid F. O'Scannlain, and William A. Fletcher, Circuit Judges. Opinion by Judge O'Scannlain.

OPINIONBY: Diarmuid F. O'Scannlain

OPINION: AMENDED OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the U.S. Environmental Protection Agency lawfully concluded that a Southern California county would have achieved the 24-hour air quality standards required by the Clean Air Act but for the negative effects of transborder emissions from Mexico.

I

Imperial County encompasses approximately 4,600 square miles in Southeastern California and is bordered by Riverside County to the north, Mexico to the south,

Arizona to the east, and San Diego County to the west. The county shares approximately 80 miles of border with Mexico. Calexico, one of three significant population centers in the county, sits close by the border, not far from the Mexican city of Mexicali. Moving north from the border, the county's other two major population centers are El Centro and Brawley. As of 1999, the county had approximately 142,000 inhabitants.

The Imperial Valley runs roughly through the center of the county, from the northwest to the southeast, and across its southern border into Mexico. Most of Imperial County, save for a small stretch of land on the county's eastern end, falls within the Imperial Valley Planning Area ("Imperial Valley"), and Intervenor Imperial County Air Pollution Control District n1 serves as the local governmental agency charged with administering and enforcing the requirements of the Clean Air Act and other federal, state and local air quality laws and regulations.

In 1987, pursuant to the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA" or "Act"), the U.S. Environmental Protection Agency ("EPA") adopted new national ambient air quality standards ("NAAQS") based on health studies demonstrating the harmful health effects of particulate matter. n2 *See* 42 U.S.C. § 7409. To comply with such standards, the expected concentration of PM-10 in a given area of the country cannot exceed (1) 150 [mu]g/m3 for more than one day per calendar year (the "24-hour standard") or (2) an expected annual arithmetic mean of 50 [mu]g/m3 (the "annual standard"). 40 C.F.R. §§ 50.6(a) and (b). The States are responsible for ensuring compliance with

both standards for PM-10 and must formulate a state implementation plan ("SIP") for doing so. *See* 42 U.S.C. §§ 7407(a) and 7410(a).

In 1990, Congress once again amended the Act to classify areas of the country as "attainment" or "nonattainment," the former classification comprising those areas that had met the NAAQS for PM-10, the latter those that had not. 42 U.S.C. § 7407(d). n3 The amendments provided for a further level of classification among those areas designated as nonattainment as either "moderate" or "serious." *Id.* § 7513.

Imperial Valley was classified as a moderate PM-10 nonattainment area. n4 The Act required such "moderate" areas to meet the NAAQS by December 31, 1994 (the "attainment date"). *id.* § 7513(c)(1). Moderate areas failing to comply with the NAAQS, by the terms of the Act, would be reclassified as "serious," *id.* § 7513(b)(2), and assigned a later attainment date, December 31, 2001, but would be required to adopt more stringent pollution controls. *Id.* §§ 7513(c)(2) & 7513a(b).

The 1990 Amendments also included a provision, CAA § 179B, which spared from § 7513(b)(2) reclassification "any State that establishes to the satisfaction of the Administrator that, with respect to a PM-10 nonattainment area in such State, such State would have attained the national ambient air quality standard for carbon monoxide n5 by the applicable attainment date, but for emissions emanating from outside the United States." 42 U.S.C. § 7509a(d). EPA issued administrative guidance in 1994 setting forth "several

types of information [that] may be used to evaluate the impact of emissions emanating from outside the U.S." and demonstrate that a border area's failure to meet the NAAQS was due to such foreign emissions. State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 59 Fed. Reg. 41,998 (Proposed Aug. 16, 1994) ("General Preamble guidance" or "guidance").

The five examples suggested by the EPA's General Preamble guidance are:1. The use of PM-10 monitors and meteorological information near the border to "evaluate and quantify any changes in monitored PM-10 concentrations with a change in the predominant wind direction." 59 Fed. Reg. at 42,001.

2. The compilation of a comprehensive inventory of PM-10 emissions "within the U.S. in the vicinity of the nonattainment area . . . [to] demonstrate that the impact of those sources on the nonattainment area after application of reasonably available controls does not cause the NAAQS to be exceeded." *Id.*

3. Analysis of "ambient sample filters for specific types of particles emanating from across the border (although not required, characteristics of foreign sources may be helpful)." *Id.*

4. A comparison between inventories of emission sources on both sides of the border and the relative magnitude of each. *Id.*

5. The use of "air dispersion and/or receptor modeling to quantify the relative impacts on the nonattainment area of sources located within the U.S. and of foreign sources of PM-10 (this approach combines information collected from the international emission inventory, meteorological stations, ambient monitoring network, and analysis of filters)." *Id.* EPA prefaced these examples by noting that "the State may use one or more of these types of information or other techniques, depending on their feasibility and applicability, to evaluate the impact of emissions emanating from outside the U.S. on the nonattainment area." *Id.* EPA added that it "will consider the information presented by the state for individual attainment areas on a case-by-case basis in determining whether an area may qualify for treatment under section 179B." *Id.*

Imperial Valley's attainment date -- December 31, 1994 -- came and went, but EPA took no action regarding reclassification. Almost six years later, when EPA still had not taken any action, the Sierra Club filed suit in U.S. District Court for the District of Columbia to compel EPA to make a reclassification determination regarding Imperial Valley. The suit was resolved by consent decree, under the terms of which EPA agreed to make a reclassification determination for Imperial Valley by October 9, 2001.

On August 10, 2001, EPA issued a notice of proposed rule-making ("NPR") in which it proposed "to find that the State of California has established to EPA's satisfaction that the Imperial Valley Planning Area (Imperial County) . . . would have attained the national ambient air quality standards (NAAQS) for particulate matter . . . by the applicable . . . attainment date, but for

emissions emanating from outside the United States, i.e., Mexico." Clean Air Act Finding of Attainment and Alternative Finding of Nonattainment and Reclassification to Serious; California-Imperial Valley Planning Area; Particulate Matter of 10 microns or less (PM-10), 66 Fed. Reg. 42,187 (proposed August 10, 2001). n6 The EPA action was based on the "Imperial County PM-10 Attainment Demonstration," a document filed on July 18, 2001 and developed by the State which used data culled from six PM-10 monitors in the county, spatial plots, n7 windroses, n8 back trajectories, n9 and a model based upon an inventory of emissions sources in the Imperial Valley. Based upon this information, the State contended that but for emissions from Mexico which were borne aloft and across the border by the wind, the county would have met both the annual and 24-hour standards by the attainment date.

Sierra Club submitted comments opposing the proposed rule, arguing that the State had failed to make the required demonstration. Specifically, Sierra Club contended that (1) under the Act, the State was required to use a certain kind of modeling in order to make the required demonstration; (2) the emissions inventory used by the State in its model was neither current nor accurate; (3) the State had failed to show that emissions from Mexico have actually caused violations to occur at U.S. monitors, but instead had merely assumed such causation; and (4) the State had failed to account for exceedances of the NAAQS after the December 31, 1994 attainment date, let alone show that those exceedances were the result of emissions from Mexico. n10

Rejecting Sierra Club's challenge to the State's demonstration, EPA issued a final rule on October 19, 2001, finding that "the State of California has established to EPA's satisfaction that the Imperial Valley Planning Area (Imperial County) . . . would have attained the national ambient air quality standards for [PM-10] . . . by the applicable Clean Air Act attainment date, December 31, 1994, but for emissions emanating from outside the United States, i.e., Mexico." Clean Air Act Finding of Attainment; California-Imperial Valley Planning Area; Particulate Matter of 10 Microns or Less (PM-10), 66 Fed. Reg. 53,106 (adopted October 19, 2001). EPA found that the State demonstration "provides the best qualitative analysis of the emissions from Mexico possible for the Imperial County area for the period in question." Id. at 53,109. EPA concluded thatwhile Sierra Club raises some important issues, EPA was aware of those issues prior to the proposed rulemaking and has not been convinced by Sierra Club that the State's 179B(d) demonstration is inadequate and that the finding of nonattainment and reclassification to serious should be finalized.Id. at 53,107.

Sierra Club timely petitions this court for review of the EPA Administrator's decision.

II

"Review of agency action to determine its conformity with . . . the CAA . . . is governed by the judicial review provisions of the [Administrative Procedure] Act, [("APA")] 5 U.S.C. §§ 701-706." Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1021 (9th Cir. 2003). Under § 706 of the APA, the court must satisfy itself that the

agency action was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We have interpreted this statutory provision as requiring the agency to "articulate[ ] a rational connection between the facts found and the choice made." Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001).

We recognize that where, as here, a court reviews an agency action "involving primarily issues of fact," and where "analysis of the relevant documents requires a high level of technical expertise," we must "defer to the informed discretion of the responsible federal agencies." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989); *see also* Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential."); Arizona Cattle Growers' Ass'n, 273 F.3d 1229, 1236 (9th Cir. 2001) ("We are deferential to the agency's expertise in situations, like that here, where resolution of the dispute involves primarily issues of fact."). While our deference to the agency is significant, we may not defer to an agency decision that "is without substantial basis in fact." Fed. Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463, 30 L. Ed. 2d 600, 92 S. Ct. 637 (1972). Indeed, the Supreme Court has made clear that, in considering an agency's explanation for its action, courts "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.,

463 U.S. 29, 43, 77 L. Ed. 2d 443 (1983) (internal quotation marks omitted). One example provided by the Court of such a "clear error of judgment" sufficient to constitute arbitrary and capricious agency action is when "the agency offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id.

At oral argument, we questioned counsel for EPA about two specific dates, January 19 and January 25, 1993, on which exceedances of the 24-hour PM-10 standard were recorded at Brawley, twenty-one miles north of the County's border with Mexico. Examining the evidence produced by the State, EPA agreed with the State's assertion that these exceedances likely were caused by wind-borne PM-10 from Mexico. Sierra Club challenged this conclusion -- both in its briefs before this court and at oral argument -- by noting that the wind data on those two days do not comport with the theory of cross-border transport of PM-10. Specifically, on January 19 and January 25, 1993, the winds in Imperial County show significant -- even predominately -- westerly components. That is, the winds were largely out of the west. Given that Brawley is, obviously, north of the Mexican border -- and northwest of Mexicali, the Mexican city alleged to be the principal source of transborder PM-10 -- Sierra Club argues that it is highly unlikely that such exceedances could be attributed to emissions from Mexico. Sierra Club buttresses its assertion that emissions from Mexico could not have caused the two exceedances at Brawley by noting that, on the two days in question, monitors south of Brawley (and thus closer to the border with Mexico) recorded significantly lower levels of PM-10

than those recorded at Brawley. Presumably, if wind-borne emissions traveling northward from Mexico were the cause of the exceedances at Brawley, one could expect similarly high levels of PM-10 closer to the border. The record indicates that such was not the case.

There was some uncertainty at oral argument -- neither the parties nor the record provided an answer -- as to whether either or both exceedance days were sufficient, standing alone, to constitute a violation of the 24-hour PM-10 NAAQS. To put it another way, the question is: If the wind-borne emissions from Mexico did not cause either or both of such exceedances, must the panel grant the petition and vacate EPA's finding?

We ordered supplemental briefing on the matter. The parties' supplemental briefs informed us that the Brawley monitor sampled the air quality only on every sixth day. In order to determine whether the two recorded exceedances constituted a violation of the 24-hour NAAQS for PM-10, which allow only for one exceedance per year of the 24-hour standard in a given area, the actual number of exceedances is adjusted to take account of the days that are not sampled. The adjustment is made according to a formula set forth at 40 C.F.R. Part 50, Appendix K. Applying this formula to the two recorded exceedances at Brawley reveals that the expected number of exceedances of the 24-hour standard is 4.3 days per year, far above the one day exceedance allowed under the NAAQS. Applying the formula to only one of the two days in question results in exceedance of the 24-hour standard on 2.14 days per year. Thus, both parties agreed in their supplemental briefs that either one of the two recorded exceedances would have been enough to trigger a violation of the 24-

hour PM-10 NAAQS. EPA continued to assert, however, that the cause of both exceedances was emissions from Mexico and thus, Imperial Valley would have attained the 24-hour standard but for such emissions.

We disagree. The pattern of recorded PM-10 levels on January 19 and January 25, 1993, does not comport with the State's theory that emissions from Mexico -- and Mexicali in particular -- caused the Brawley monitors to exceed the 24-hour NAAQS for PM-10. We believe that EPA's conclusion that Imperial Valley would have satisfied the 24-hour standard but for emissions from Mexico "runs counter to the evidence" before the agency concerning the exceedances at Brawley. State Farm, 463 U.S. at 43. As noted above, the data upon which EPA relies show winds trending, at best, in a southwesterly direction, but even then only nominally so. The windroses, meanwhile, show a similar west to southwesterly component. The evidence most supportive of EPA's position is the windrose from Calipatria, 10.5 miles north of Brawley, which reveals very slight south-southeasterly winds. But that same windrose shows stronger winds from the northwest. At oral argument, counsel for EPA had no explanation for the decided lack of southerly winds on the days in question, but nevertheless insisted that the data showed winds with a southerly component. There are two problems with counsel's assertion, which was reiterated in EPA's supplemental brief. First, EPA's notion of what constitutes a southerly wind in the windroses is, at the least, expansive and, at most, positively incorrect. Second, the "southerly component" EPA professes to locate in the wind data would appear to be inconsistent with its theory of the case: that is,

whatever "southerly component" the wind data reveals is of the west-southwesterly variety and thus does not support the theory of transport from Mexico.

III

Although the normal course of action when the record fails to support an agency's decision "is to remand to the agency for additional investigation or explanation," Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985), both Supreme Court and Ninth Circuit precedent acknowledge the propriety of remanding with instructions in exceptional cases. See, e.g., id. ("except in rare circumstances"); Alvarado Cmty. Hosp. v. Shalala, 155 F.3d 1115, 1125 (9th Cir. 1998) *as amended by* 166 F.3d 950 (9th Cir. 1999) (remanding with instructions to recalculate Medicare service provider reimbursements using newly-available data); Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996) (remanding with instructions to award Social Security benefits because "the record has been fully developed and . . . further administrative proceedings would serve no useful purpose"); *see also* Sierra Club v. EPA, 311 F.3d 853 (7th Cir. 2002) (remanding with instructions where the EPA had exceeded its statutory authority by granting a nonattainment exception on statutorily-unenumerated grounds).

We think this is such a case. Based on the data and the reports in the record, there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedences on January 19 and January 25. We fail to see how further administrative proceedings would serve a useful purpose; the record here has been fully

developed, and the conclusions that must follow from it are clear. We therefore GRANT the petition, VACATE the order, and REMAND WITH INSTRUCTIONS that the EPA classify Imperial Valley as a "serious" nonattainment area. n11

Footnotes

n1 The parties refer to Intervenor as "the State." We adopt their practice.

n2 Particulate matter, for the purposes of the NAAQS, is defined as airborne material having an aerodynamic diameter of 10 microns or less. Hence the common abbreviation "PM-10." Studies showed that, when inhaled, PM-10 particles can penetrate deep into the respiratory tract where they can lodge in the lung tissue and lead to a variety of respiratory problems.

n3 There is an additional category, "unclassifiable," for those areas where there is insufficient information upon which to base a classification.

n4 The sources of PM-10 in Imperial County are dust ("primary geological material," contributing more than 70 percent of the concentration), motor vehicle emissions (10 to 15 percent), and agricultural burning (4 to 8 percent).

n5 All parties agree that the use of the term "carbon monoxide" instead of "PM-10" is simply an editorial mistake. *See* Petitioner's Opening Br. at 7 n.2; Response Br. at 6 n.5; *and* Intervenor's Br. at 7 n.4.

n6 As the title of the proposed rule indicates, if it were convinced by the public comments, EPA would

conclude that the State failed to make a sufficient showing under § 179B. The NPR was accompanied by a technical support document ("TSD") that examined the evidence put forward by Imperial Valley in support of its assertion that it would have attained the NAAQS but for emissions from Mexico.

n7 Spatial plots demonstrate the concentration of PM-10 measurements at various monitoring stations in a given area. In this case, the State contends that spatial plots tend to show a high concentration of PM-10 at those stations close to the border, with decreasing levels the further one moves north, consistent with its theory that windblown emissions from Mexico waft into Imperial County, causing exceedances of PM-10 NAAQS.

n8 A windrose is a diagram showing the percentage of time that wind blows from each compass direction for various ranges of wind speeds.

n9 A back trajectory is a map that, by measuring the speed and direction of winds a certain distance above the ground, attempts to show where a given parcel of air that hits a monitor most likely originated. According to the State's Attainment Demonstration, "the trajectories demonstrate 1) when the air passes through Mexico and then into Imperial County; 2) when the air might have circumvented the monitors in Calexico and impacted the northern monitors in Imperial County; and 3) when air may have come from Mexico, but not necessarily through Mexicali."

n10 Sierra Club also contended that the refusal to reclassify Imperial Valley as a serious nonattainment

area would be unlawful because the State had failed to submit a state implementation plan. This claim is not raised in its petition for review.

n11 Because we have reversed EPA's conclusion with respect to the 24-hour NAAQS, and because the Ninth Circuit has previously held that an area must meet both the 24-hour and annual NAAQS in order to comply with Clean Air Act requirements, *see* Ober v. EPA, 84 F.3d 304, 309 (9th Cir. 1996), we need not reach the merits of Sierra Club's challenge to EPA's conclusion regarding Imperial Valley's attainment of the annual PM-10 NAAQS.

No. 01-71902

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB,
Petitioner,

IMPERIAL COUNTY AIR
POLLUTION CONTROL DISTRICT,
Intervenor,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; MICHAEL O. LEAVITT,
Respondents.

December 18, 2003, Filed

COUNSEL: For Sierra Club, Petitioner: David S. Baron, Esq., EARTHJUSTICE LEGAL DEFENSE FUND, Washington, DC.

For Imperial County Air Pollution Control District, Intervenor: Rick R. Rothman, Esq., McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP, Los Angeles, CA. William H. Freedman, Esq., MCCUTCHEN, DOYLE, BROWN & ENERSEN, LLP, Los Angeles, CA.

For United States Environmental Protection Agency, Christine Whitman, Respondents: Administrator, Environmental Protection Agency, Washington, DC. General Counsel, ENVIRONMENTAL

PROTECTION AGENCY, Office of the General Counsel, Washington, DC. Chief Counsel - EPA, U.S. ENVIRONEMNTAL PROTECTION AGENCY, Washington, DC. Regional Counsel, ENVIRONMENTAL PROTECTION AGENCY, Region 9, San Francisco, CA. Thomas H. Pacheco, Esq., UNITED STATES DEPARTMENT OF JUSTICE, San Francisco, CA.

JUDGES: Before: William C. Canby, Jr., Diarmuid F. O'Scannlain, and William A. Fletcher, Circuit Judges.

OPINION: ORDER

The opinion filed October 9, 2003 is hereby amended as follows: Slip. Op. at 15008, lines 10-8 *from the bottom*: Replace the sentence that currently reads "The best evidence adduced by EPA is the windrose from Calipatria, several miles south of Brawley, which reveals very slight south-southeasterly winds" with the following:

"The evidence most supportive of EPA's position is the windrose from Calipatria, 10.5 miles north of Brawley, which reveals very slight south-southeasterly winds."

With this amendment, the petition for rehearing is hereby DENIED.

Intervenor Imperial County Air Pollution Control District's motion to stay the mandate is GRANTED until March 17, 2004 to permit said Intervenor to file a petition for certiorari with the United States Supreme Court. If before that date a petition for certiorari is

filed, this stay shall remain in effect until final disposition by the Supreme Court.

[Federal Register: August 10, 2001
(Volume 66, Number 155, Pages 42187-42193)]

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 81

[CA038-FOA; FRL -7031-9]

Clean Air Act Finding of Attainment and Alternative Finding of Nonattainment and Reclassification to Serious; California-Imperial Valley Planning Area; Particulate Matter of 10 microns or less (PM-10)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to find that the State of California has established to EPA's satisfaction that the Imperial Valley Planning Area (Imperial County), a PM-10 moderate nonattainment area, would have attained the national ambient air quality standards (NAAQS) for particulate matter of ten microns or less (PM-10) by the applicable Clean Air Act (CAA or the Act) attainment date, December 31, 1994, but for emissions emanating from outside the United States, i.e., Mexico. If EPA takes final action on this proposed finding, Imperial County will not be subject to a finding of failure to attain and reclassification to serious.

Alternatively, EPA is proposing to find that Imperial County did not attain the PM-10 NAAQS by its CAA mandated attainment date. This proposed finding is based on monitored air quality data for the PM-10

NAAQS during the years 1992-1994. If EPA takes final action on this proposed finding, Imperial County will be reclassified by operation of law as a serious nonattainment area under section 188(b)(2)(A) of the CAA.

EPA is proposing the above actions in the alternative in the event that public comments convince EPA that the State has not established that Imperial County would have attained the PM-10 NAAQS but for international transport by the applicable attainment date.

DATES: Comments on this proposed rule must be received in writing by September 10, 2001.

ADDRESSES: Comments should be addressed to Doris Lo, U.S. Environmental Protection Agency, Region 9, Air Division, Planning Office (AIR-2), 75 Hawthorne Street, San Francisco, California 94105.

FOR FURTHER INFORMATION CONTACT: Doris Lo, U.S. Environmental Protection Agency, Region 9, Air Division, Planning Office (AIR-2), 75 Hawthorne Street, San Francisco, California 94105, (415) 744-1287, lo.doris@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. CAA Provisions and EPA Actions Concerning Designation and Classification

On November 15, 1990, the date of enactment of the 1990 Clean Air Act Amendments, PM-10 areas meeting

the qualifications of section 107(d)(4)(B) of the Act were designated nonattainment by operation of law. Once an area is designated nonattainment, section 188 of the Act outlines the process for classification of the area and establishes the area's attainment date. Pursuant to section 188(a), all PM-10 nonattainment areas were initially classified as moderate by operation of law upon designation as nonattainment. These nonattainment designations and moderate area classifications were codified in 40 CFR part 81 in a Federal Register notice published on November 6, 1991 (56 FR 56694). The Imperial Valley Planning Area, consisting of all but the easternmost portion of Imperial County, was designated nonattainment and classified as moderate. See 40 CFR 81.305.

States containing areas which were designated as moderate nonattainment by operation of law under section 107(d)(4)(B) were to develop and submit state implementation plans (SIPs) to provide for the attainment of the PM-10 NAAQS. Pursuant to section 189(a)(2), those SIP revisions were to be submitted to EPA by November 15, 1991.

B. CAA Provisions Concerning Reclassification to Serious Nonattainment

Pursuant to sections 179(c) and 188(b)(2) of the Act, EPA has the responsibility to determine within 6 months of the applicable attainment date, whether PM-10 nonattainment areas have attained the NAAQS. Section 179(c)(1) of the Act provides that these determinations are to be based upon an area's "air quality as of the attainment date," and section 188(b)(2) is consistent with this provision. EPA makes the

determinations of whether an area's air quality is meeting the PM-10 NAAQS based upon air quality data gathered at monitoring sites in the nonattainment area. These data are reviewed to determine the area's air quality status in accordance with EPA guidance at 40 CFR part 50, appendix K.

Pursuant to appendix K, attainment of the annual PM-10 standard is achieved when the annual arithmetic mean PM-10 concentration is equal to or less than 50 g/m3. Attainment of the 24-hour standard is determined by calculating the expected number of exceedances of the 150 g/m3 limit per year. The 24-hour standard is attained when the expected number of exceedances is 1.0 or less. A total of 3 consecutive years of clean air quality data is generally necessary to show attainment of the 24-hour and annual standards for PM-10. A complete year of air quality data, as referred to in 40 CFR part 50, appendix K, is comprised of all 4 calendar quarters with each quarter containing data from at least 75 percent of the scheduled sampling days.

Under section 188(b)(2)(A), a moderate PM-10 nonattainment area must be reclassified as serious by operation of law after the statutory attainment date if the Administrator finds that the area has failed to attain the NAAQS. Pursuant to section 188(b)(2)(B) of the Act, EPA must publish a notice in the Federal Register identifying those areas that failed to attain the standard and the resulting reclassifications.

C. CAA Provisions Concerning International Border Areas

Imperial County shares its southern border with Mexico. CAA section 179B(d) provides that, notwithstanding any other provision of law, any State that establishes to the satisfaction of EPA that a PM-10 nonattainment area in such State would have attained the PM-10 NAAQS by the applicable attainment date but for emissions emanating from outside the United States (U.S.) shall not be subject to the provisions of CAA section 182(b).

Section 179B(a) sets forth the state implementation plan (SIP) requirements for moderate PM-10 areas that can make the above demonstration.

II. Proposed Finding of Attainment Under CAA Section 179B(d)

EPA is today proposing to find that, pursuant to CAA section 179B(d), the State of California has established to EPA's satisfaction that Imperial County attained the NAAQS for PM-10 by the applicable attainment date, December 31, 1994, but for emissions emanating from outside the U.S., and thus shall not be subject to a finding of failure to attain and reclassification under CAA section 188(b)(2). As discussed below, this proposed finding is based on the "Imperial County PM-10 Attainment Demonstration" (hereafter referred to as the "179B(d) demonstration") which was developed by the Imperial County Air Pollution Control District (ICAPCD) and transmitted to EPA by the California Air Resources Board (CARB) on July 18, 2001. (July 18, 2001 letter with enclosure from Michael P. Kenny,

Executive Officer, Air Resources Board to Ms. Laura Yoshii, Acting Regional Administrator, EPA Region 9).fn1

EPA has issued preliminary guidance relating to serious PM-10 nonattainment areas fn2 (General Preamble guidance) that includes a discussion of the requirements applicable to international border areas. For these areas, the General Preamble guidance discusses the information and methods that can be used in determining whether an area qualifies for treatment under CAA section 179B and then discusses SIP requirements for areas which are able to demonstrate that they would be in attainment but for the emissions emanating from outside the U.S. This proposal does not address the SIP requirements for the County but only the question of whether or not the State has established that Imperial County attained the NAAQS by December 31, 1994 but for international transport. If EPA issues a final finding that the nonattainment area would have attained but for international transport, EPA will in separate actions address the applicable SIP provisions and submissions by the State.

The General Preamble guidance states that "[s]everal types of information may be used to evaluate the impact of emissions emanating from outside the U.S. The EPA will consider the information presented by the State for individual nonattainment areas on a case-by-case basis in determining whether an area may qualify for treatment under section 179B. * * * " The General Preamble guidance also suggests five methods which may be used in determining the impact of emissions emanating from outside the U.S. and states that "the State may use one or more of these types of

information or other techniques, depending on their feasibility and applicability, to evaluate the impact of emissions emanating from outside the U.S. on the nonattainment area." Below is a discussion of each of the methods as addressed in the 179B(d) demonstration.

Method 1. Place several ambient PM-10 monitors and a meteorological station measuring wind speed and direction in the U.S. non-attainment area near the international border. Evaluate and quantify any changes in monitored PM-10 concentrations with a change in direction in the predominant wind direction.

There are six PM-10 monitors in the nonattainment area, with two monitors in the proximity of the border (Calexico-Grant St. and Calexico-Ethel St., each 1.2 km from the Mexican border). A meteorological station at the Imperial County Airport was used to provide a windrose for each exceedance day. The 179B(d) demonstration provided, for each exceedance day, an analysis of the transport of PM-10 from Mexico, based on the spatial distribution of PM-10 throughout the basin, along with a windrose, and a series of back trajectories (based on the National Oceanic and Atmospheric Administration HYSPLIT program). More details of this analysis are presented in the technical support document (TSD) for today's proposed rule.

PM-10 exceedances were recorded on seven days in the 1992-1994 time period. An analysis of the exceedances, which includes the spatial plots, windroses, and trajectories for each of the days, is presented in Appendix A to the 179B(d) demonstration. EPA's TSD

discusses in detail each of the days and the basis for concluding that exceedances would not have occurred but for transport from Mexico.

For five of the days (August 23, 1993, July 7, 1994, August 6, 1994, October 17, 1994, and December 16, 1994) the analysis clearly supports the conclusion that but for the transport of emissions from Mexico, the PM-10 concentrations would not have exceeded the standard. The spatial plots for these days indicate a pattern of higher concentration near the border and show PM-10 concentrations decreasing with distance from the border. The windroses for August 23, 1993, July 7, 1994, August 6, 1994, indicate that a large number of hours (17 to 19) have the potential to carry emissions from Mexico to Imperial County.

For two of the exceedance days (January 19, 1993, and January 25, 1993) there are less data on which to base an analysis. The days are similar in character. For each day, there is only one measured value, at the Brawley monitor, which is slightly more than 20 miles from the border, so the spatial plot is inconclusive. The days are classified as stagnant. The windroses show that there is a potential to carry emissions from Mexico for 14 of 24 hours. The January 19, 1993 PM-10 concentration is only slightly above the standard (162 g/m\3\), and is likely to have been influenced by transport, given the stagnant conditions and the shape of the windrose. A PM-10 value of 175 g/m\3\ was measured on January 25, 1993. The emissions from Mexico are likely to have contributed to the PM-10 concentration at the monitor, although it is difficult to precisely quantify the extent of the contribution. Given the magnitude of emissions in the City of Mexicali (see method 4 discussion below), it

is likely that the PM-10 standard would not have been exceeded but for the contribution of emissions from Mexico.

Method 2. Comprehensively inventory PM-10 emissions within the U.S. in the vicinity of the nonattainment area and demonstrate that the impact of those sources on the nonattainment area after application of reasonably available controls does not cause the NAAQS to be exceeded. This analysis must include an influx of background PM-10 in the area. Background PM-10 levels could be based on concentrations measured in a similar area not influenced by emissions from outside the U.S.

The 179B(d) demonstration relied on the most recent gridded modeling inventory available. This inventory was prepared by CARB as part of the Southern California Ozone Study, fn3 using 1997 emissions data. A background concentration of 25 g/m\3\ was used, based on an analysis of the distribution of observed PM-10 data in Imperial County. The 25 g/m\3\ value represents the 10% cleanest days monitored in Imperial County. The inventory and background level were included in the modeling analysis discussed under method 5 below. The 179B(d) demonstration did not include an analysis of Method 2.

Method 3. Analyze ambient sample filters for specific types of particles emanating from across the border (although not required, characteristics of emissions from foreign sources may be helpful.)

The 1992-1993 Imperial Valley/Mexicali Cross Border PM-10 Transport Study (Final Report, January 30,

1997) includes an analysis of the particles collected in areas within Imperial County where violations have been recorded. This sample analysis determined that geological dust (70-90%), motor vehicle exhaust (10-15%) and vegetative burning (10%) account for the highest contribution to PM-10 concentrations. These are the predominant emissions sources on both sides of the border. Thus, the filter analysis by itself could not be used to determine the extent to which violations might result from international transport; however, as discussed in the TSD, the transport study provided conclusions about the international contribution based on a meteorological analysis of airflow in the study area.

Method 4. Inventory the sources on both sides of the border and compare the magnitude of PM-10 emissions originating within the U.S. to those emanating from outside the U.S.

The 1996 PM-10 emission inventory for the City of Mexicali, compiled by Radian (Radian International 2000 Mexicali Air Emission Inventory, February 2000) is of lower quality than the emissions inventory for the Imperial County sources; however, it is useful for a comparison of the magnitude of PM-10 emissions from each side of the border. The estimated emissions for the City of Mexicali (257 tons/day) are approximately equal to the PM-10 inventory for Imperial County (246 tons/day). The density of the emissions is much higher in Mexicali than in Imperial County because the City of Mexicali covers a much smaller geographic area than Imperial County. Furthermore, the City of Mexicali is in close proximity to that portion of Imperial County where violations have been recorded. This comparison

does not prove PM-10 transport into Imperial County, but it does suggest that the City of Mexicali has the potential to be a substantial source contributing to the PM-10 concentrations in Imperial County because of the magnitude of the emissions, the density of the emissions, and the proximity to Imperial County.

Table A.--Comparison of Imperial County and Mexicali PM-10 Emissions

	Imperial County	County of Mexicali
1996 PM-10 Emissions (tons/day).....	246	257
Population (2000).....	142,361	662,617
Area—square miles.....	4060	200
Growth rate in percent (1999-2000).....	30	42

Source: 1996 PM-10 emission inventory for the City of Mexicali, compiled by Radian (Radian International 2000 Mexicali Air Emission Inventory, February 2000).

Method 5. Perform air dispersion and/or receptor modeling to quantify the relative impacts on the non-attainment area of sources on PM-10 emissions.

The 179B(d) demonstration includes air dispersion modeling for 1992, 1993 and 1994. The modeling inputs (meteorological data and inventory), model selection and modeling results are discussed in the TSD. The performance of the model relative to measured ambient

concentrations could not be determined because emissions from Mexicali were not modeled. Therefore, EPA cannot evaluate the model performance and, as a result, the Agency believes that the modeling results are not sufficiently robust at this time to demonstrate that Imperial County would have been in attainment of the 24-hour PM-10 standards but for PM-10 emissions from Mexico.

The results of the modeling are more useful for the demonstration of the annual standard, which is less sensitive to model inputs. The annual arithmetic mean for the Brawley monitoring station for the years 1992-1994 is only slightly above the annual standard, (51 g/m^3), and this part of the basin is therefore likely to have attained the standard, but for international transport. The Calexico-Grant St. and Calexico-Ethel St. sites are in close proximity to the border. The Calexico Grant St. annual average was 56 g/m^3. The Calexico-Ethel St. site, which has only partial data, has an annual average design value of 120 g/m^3 in 1994, after adjustments upward for missing data. The modeling results (included in the TSD) also indicate that the annual standard would have been attained for each year from 1992-1994 at each of the Calexico sites.fn4 Based on the proximity to the border, the magnitude of the Mexicali emissions and the modeling results, EPA believes, that the annual standard would have been attained at these sites but for transport.

Summary of EPA Evaluation of 179B(d) Demonstration

The State's demonstration is based on a competently collected and examined set of the relevant available information, and reaches a reasoned conclusion that

each of the 1992-94 exceedances, which are only slightly above the NAAQS, would likely not have occurred without pollutant transport from Mexico. However, In reviewing the methods for determining international transport, EPA lacks some information that would be helpful in determining with greater certainty the extent to which emissions from Mexico contributed to monitored values above the NAAQS. For example, the State was hampered by the absence of ambient monitoring or accurate emission inventories in the Mexicali area in the period 1992-94. These data cannot now be recreated in order to enable a more conclusive analysis. Thus, EPA believes that the 179B(d) demonstration has provided evidence sufficient to show that, but for international transport of PM-10, Imperial County would have attained the 24-hour PM-10 NAAQS by the December 31, 1994 deadline. This showing rests primarily on the qualitative analysis of wind patterns on exceedance days discussed under method 1 and is further supported by the emissions inventories discussed under method 4. Furthermore, EPA believes the modeling discussed under Method 5 provides a demonstration that the annual PM-10 NAAQS has been attained but for international transport.

If EPA takes final action finding that the State has met the requirements of CAA section 179B(d), Imperial County must meet the planning requirements specified in CAA section 179B(a). Because the area has recorded PM-10 violations after 1994, EPA interprets the latter section as requiring, among other things, that the moderate area plan must provide for sufficient controls to demonstrate maintenance of the NAAQS after the

applicable attainment date, but for emissions from outside of the United States.

III. Proposed Finding of Failure To Attain

As discussed above, EPA is proposing to find that the State of California has established to EPA's satisfaction that Imperial County would have attained the NAAQS for PM-10 by the applicable attainment date, December 31, 1994, but for emissions emanating from outside the U.S., and thus shall not be subject to a finding of failure to attain and reclassification. Because the 179B(d) demonstration is not completely definitive, however, EPA invites public comment on the issue and is proposing, in the alternative, to find that Imperial County did not attain either the 24-hour or annual PM-10 NAAQS by December 31, 1994. In the event that public comments convince EPA that the State has not made an adequate demonstration under section 179B(d) of the CAA, EPA plans to finalize this proposed finding of failure to attain. This proposed finding is based on air quality data (discussed below) indicating violations of the PM-10 NAAQS during 1992-1994. If EPA takes final action on this proposed finding, Imperial County will be reclassified by operation of law as a serious nonattainment area under section 188(b)(2)(A) of the CAA.

A. Analysis of the Ambient Air Monitoring Data

The 24-hour Standard

Table C below lists each of the monitoring sites in Imperial County where the 24-hour NAAQS (150 g/m^3) was violated during 1992-1994.

Note: There is no Table B in this proposed rule.

Table C.--Exceedance Values for Sites Violating the 24-hour PM-10 NAAQS
[Micrograms per cubic meter, g/m^3]

Site	Exdeedance	Date of exceedance
Brawley.....	175 Mμg/m^3	1/25/93
	162 μg/m^3	1/19/93
Calexico Dichot--900 Grant Street.....	208 μg/m^3	10/9/92
	253 μg/m^3	8/23/93
	156 μg/m^3	1/20/94
El Centro.....	166 μg/m^3	8/23/93
El Centro Dichot.....	167 μg/m^3	8/23/93
Calexico--900 Grant St. (initiated 1994).....	182 μg/m^3	8/6/94
	165 μg/m^3	7/7/94
	159 μg/m^3	10/17/94
Calexico--1029 Ethel St (initiated 1994).....	258 μg/m^3	8/6/94

Under 40 CFR part 50, the 24-hour NAAQS is attained when the expected number of days per calendar year with a 24-hour average concentration above 150 g/m^3 is equal to or less than one. In general, the number of expected exceedances at a site which samples every

day is determined by recording the number of exceedances in each calendar year and then averaging them over the past three calendar years. For sites which do not sample every day, EPA requires the adjustment of observed exceedances to account for days not sampled. The procedures for making the adjustment are specified in 40 CFR part 50, appendix K.

The four monitoring sites (Brawley, Calexico-Dichot, El Centro, and El Centro-Dichot) in Imperial County that recorded violations of the 24-hour PM-10 NAAQS operated on a one-in-six day sampling schedule. After making the adjustment for days not sampled, the number of expected exceedances from 1992-1994 at four of the above monitoring sites were 4.3, 6.1, 2.0 and 2.0, for the Brawley, Calexico Dichot--Grant St., El Centro and El Centro Dichot sites, respectively. These expected exceedances cause the four monitoring sites to be in violation of the 24-hour PM-10 NAAQS. EPA is also including data from two additional samplers (Calexico--Grant St. and Calexico--Ethel St.) which exceeded the 24-hour PM-10 NAAQS in their initial year of operation, 1994.

The Annual Standard

Table D below lists each of the monitoring sites where the annual standard was violated during 1992-1994.

Table D.--Arithmetic Mean Values for Sites Violating the Annual PM-10 NAAQS
[Micrograms per cubic meter, g/m^3]

Site	1992 annual arithmetic mean	1993 annual arithmetic mean	1994 annual arithmetic mean
Brawley.....	48 $\mu g/m^3$....	53 $\mu g/m^3$....	52 $\mu g/m^3$
Calexico..... Dichot—900 Grant St.	58 $\mu g/m^3$....	59 $\mu g/m^3$....	50 $\mu g/m^3$
Calexico—900... Grant St. (initiated 1994)	ND.....	ND.....	75 $\mu g/m^3$
Calexica—1029. Ethel St. (initiated 1994)	ND.....	ND.....	120 $\mu g/m^3$

ND--No Data.

According to 40 CFR part 50, the annual standard for PM-10 is attained when the expected arithmetic mean concentration, as determined by 40 CFR part 50 Appendix K, is less than or equal to 50 g/m\3\. In general, the expected annual arithmetic mean is determined by averaging the annual arithmetic mean PM-10 concentrations for the past 3 calendar years.

The annual standard was not attained at two monitoring sites (Brawley and Calexico Dichot--Grant St.) in Imperial County. Based on the monitoring data collected during 1992-1994, the Brawley site had an annual average of 51 g/m\3\, and the Calexico Dichot--

Grant St. had an annual average of 56 g/m\3\. EPA is also including data from 2 additional samplers (Calexico--Grant St. and Calexico--Ethel St.) which violated the annual PM-10 NAAQS and were initiated in 1994.

B. SIP Requirements for Serious Areas

If EPA takes final action finding that Imperial County failed to attain the PM-10 NAAQS by December 31, 1994, the area will be reclassified by operation of law as a serious nonattainment area under section 188(b)(2)(A) of the CAA. PM-10 nonattainment areas reclassified as serious under section 188(b)(2) of the CAA are required to submit, within 18 months of the area's reclassification, SIP revisions providing for the implementation of best available control measures (BACM) no later than four years from the date of reclassification. The SIP must also, among other things, provide for attainment of the PM-10 NAAQS by December 31, 2001.fn5 See CAA sections 188(c)(2) and 189(b). EPA has provided specific guidance on developing serious area PM-10 SIP revisions. See 59 FR 41998 (August 16, 1994).

IV. Today's Proposed Actions

EPA is today proposing to find that the State of California has established to EPA's satisfaction that Imperial County has attained the PM-10 NAAQS by the applicable attainment date, December 31, 1994, but for the emissions emanating from outside the U.S., and thus shall not be subject to a finding of failure to attain and reclassification to serious.

In view of the technical issues and difficulties involved in demonstrating cross-border transport and in the event that public comment convinces EPA that the State has not made an adequate demonstration, EPA is also proposing, in the alternative, to find that Imperial County did not attain either the 24-hour or annual PM-10 NAAQS by the required attainment date. If EPA takes final action on this proposed finding, Imperial County will be reclassified by operation of law as a serious nonattainment area under section 188(b)(2)(A) of the CAA.

EPA requests public comments on all aspects of these alternative proposals. EPA will consider any comments received by September 10, 2001.

V. Administrative Requirements

A. Executive Order 12866

Under E.O. 12866, 58 FR 51735 (October 4, 1993), EPA is required to determine whether regulatory actions are significant and therefore should be subject to OMB review, economic analysis, and the requirements of the Executive Order. The Executive Order defines a "significant regulatory action" as one that is likely to result in a rule that may meet at least one of the four criteria identified in section 3(f), including, (1) have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3)

materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients therof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that the proposed finding of attainment pursuant to CAA section 179B(d) and the proposed finding of failure to attain and the resulting reclassification would result in none of the effects identified in section 3(f). A finding of attainment under section 179B(d) of the CAA does not impose any additional requirements on an area and a finding of failure to attain under section 188(b)(2) is based upon air quality considerations and the subsequent nonattainment area reclassification must occur by operation of law in light of those air quality conditions. These actions do not, in-and-of-themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because those requirements are automatically triggered by classifications that, in turn, are triggered by air quality values, findings of failure to attain and reclassification cannot be said to impose a materially adverse impact on State, local, or tribal governments or communities.

B. Executive Order 13211

The proposed finding of attainment under CAA 179B(d) and the proposed finding of failure to attain and the resulting reclassification are not subject to Executive Order 13211, "Actions Concerning Regulations That

Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because they are not significant regulatory actions under Executive Order 12866.

C. Executive Order 13045

Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The proposed finding of attainment under CAA 179B(d) and the proposed finding of failure to attain under CAA 188(b)(2) and resulting reclassification are not subject to Executive Order 13045 because they do not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13132

Executive Order 13132, "Federalism," (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, "Federalism," and 12875, "Enhancing the Intergovernmental Partnership." Executive Order

13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

These proposed findings will not have substantial direct effects on California, on the relationship between the national government and California, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. As stated above, a finding of attainment under section 179B(d) of the CAA does not impose any additional requirements on an area and a finding of failure to attain under section 188(b)(2) is based upon air quality considerations and the subsequent nonattainment area reclassification must occur by operation of law in light of those air quality conditions.

These actions do not, in-and-of-themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because those requirements are automatically triggered by classifications that, in turn, are triggered by air quality values, findings of failure to attain and reclassification cannot be said to impose a materially adverse impact on State, local, or tribal governments or communities. Thus, the requirements of section 6 of the Executive Order do not apply to these proposed alternative actions.

E. Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

The proposed finding of attainment under CAA 179B(d) and the proposed finding of failure to attain under CAA 188(b)(2) and resulting reclassification do not have tribal implications. For the reasons discussed above, they will not have substantial direct effects on tribal governments, on the relationship between the Federal

government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

As discussed above, the proposed finding of attainment under CAA 179B(d) and the proposed finding of failure to attain under CAA 188(b)(2) and resulting reclassification do not impose additional requirements on small entities. Therefore, I certify that these alternative actions will not have a significant economic impact on a substantial number of small entities.

G. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final

rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

With respect to EPA's proposed finding of attainment under CAA 179B(d) and the proposed finding of failure to attain under CAA 188(b)(2) and resulting reclassification, EPA notes that these actions in-and-of themselves establish no new requirements, and EPA believes that it is questionable whether a requirement to submit a SIP revision constitutes a federal mandate (i.e., required serious area SIP submittal resulting from a finding of failure to attain). The obligation for a State to revise its SIP arises out of sections 110(a) and 179(d) of the CAA and is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of section 421(5)(9a)(I) of UMRA (2 U.S.C. 658(a)(I)). Even if it did, the duty could be viewed as falling within the exception for the condition of Federal assistance under section 421(5)(a)(I)(I) of UMRA (2 U.S.C. 658(5)(a)(I)(I)).

In addition, even if the obligation for a State to revise its SIP does create an enforceable duty within the meaning of UMRA, this action does not trigger section

202 of UMRA because the aggregate to the State, local, and tribal governments to comply are less than $100,000,000 in any one year. Because this action does not trigger section 202 of UMRA, the requirement in section 205 of UMRA that EPA identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most effective, or least burdensome alternative that achieves the objectives of the rule is not applicable.

Furthermore, EPA is not directly establishing any regulatory requirements that may significantly impact or uniquely affect small governments, including tribal governments. Thus, EPA is not obligated to develop under section 203 of UMRA a small government agency plan.

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to today's proposed actions because they do not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401-7671q.

Dated: August 6, 2001.
Laura Yoshii,
Acting Regional Administrator, Region IX.
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Footnotes

fn1 In his letter, Mr.Kenny state's that CARB "worked closely with the Imperial County Air Pollution Control District * * * in developing their analysis, and agree with their conclusion that the area would have attained the standard from 1992 through 1994 but for transport from Mexico. Independent Air Resources Board analyses of all exceedances in that time frame support the District's conclusion." Because CARB has ratified the ICAPCD's 179B(d) demonstration and transmitted it to EPA, it is referred to in this proposal as the State's demonstration.

fn2 "State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 59 FR 41998, August 16, 1994.

fn3 The Southern California Ozone Study (SCOS) was a large-scale field measurement program carried out in southern California during the summer of 1997 to collect sufficient aerometric data to allow data analysts and modelers to characterize and simulate ozone formation and fate in the region. Several agencies and others participated during the planning and operational phases of the field study, including CARB, EPA, local districts, the U.S. Navy, and the marine industry.

fn4 Modeled annual average concentrations at all of the sites are below 43 g/m\3\ for each of the 3 years, assuming only emissions from the United States side of the border.

fn5 If certain conditions are met, EPA may extend this attainment deadline to no later than December 31, 2006. CAA section 188(e).

Imperial County, California PM-10 Nonattainment Area

Proposed Finding of Attainment of the 24-hour and Annual PM-10 Standards But For the Emissions Emanating from Mexico; And Alternative Proposed Finding of Failure to Attain the 24-hour and Annual PM-10 Standards.

Technical Support Document (Proposed Finding of Attainment under Clean Air Act Section 1798(d)- Additional Discussion of Method l and Method 5)

August 10, 2001

Authors:
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Attachment 1: Imperial. County PM10 Attainment Demonstration; Prepared for Imperial County Air Pollution Control District by ENVIRON, July 20-01,

transmitted to EPA by the California Air Resources Board on July 18, 2001.

Attachment 2: Additional windroses and windfields for January 25, 1993; transmitted to Carol Bohnenkamp, EPA Region 9, Air Division by Ralph Morris, ENVIRON.

I. Introduction

On August 6, 2001, EPA issued two alternative proposals:

1) EPA proposed to find that the State of California has established to EPA's satisfaction that Imperial County, a PM-10 moderate nonattainment area, would have attained the national ambient-air quality standards (NAAQS) for particulate matter of ten microns or less (PM-10) by the applicable Clean Air Act (CAA or the Act) attainment date, December 31, 1994, but for emissions emanating from outside the United States, i.e., Mexico. This proposed finding is based on the "Imperial County PM10 Attainment Demonstration," (Attachment 1, also referred to as the State's demonstration or the 179B(d) demonstration) provided to EPA by the State of California. If EPA takes final action on this proposed finding, Imperial County will not-be subject to a finding of failure to attain and reclassification to serious.

2) Alternatively, EPA proposed to find that Imperial County did not attain the PM-10 NAAQS by its CAA mandated attainment date. This proposed finding is based on monitored air quality data for the PM-10

NAAQS during the years 1992-1994. If EPA takes final action on this proposed finding, Imperial County will be reclassified by operation of law as a serious nonattainment area under section 188 (b) (2) (A) of the CAA.

These proposed alternative actions were published in a Federal Register notice (66 FR 42187) on August 10, 2001 (notice of proposed rulemaking or NPR). The 30 day public comment period will end on September 10, 2001. EPA intends, to issue a final action shortly thereafter.

EPA is, requesting public comments on both proposals. The purpose of this technical support document (TSD) is to supplement the NPR's discussion of the proposed finding of attainment under CAA section 179B(d), specifically Methods 1 and 5.

As discussed in the NPR, EPA is proposing to find that the State has established to EPA s satisfaction that the Imperial County moderate PM-10 nonattainment area would have attained the annual and 24-hour NAAQS for PM-10 by the applicable attainment date, 1994, but for the emissions emanating from Mexico. This proposed finding is based on the "Imperial County PM10 Attainment Demonstration" which was transmitted to EPA by the California Air. Resources Board on July 18, 2001 (Attachment 1, also referred to as the 179B(d) demonstration) and "additional windroses and windfields for January 25, 1993" which was transmitted to Carol Bohnenkamp, EPA Region 9, Air Division by Ralph Morris, ENVIRON (Attachment 2). EPA's analysis of how

these documents meet CAA section 179B(d) and EPA's General Preamble guidance fn1 is found in the NPR. In addition to the NPR discussion, EPA is below providing a more detailed day-by-day analysis which supports its conclusions regarding Method 1 and a summary of the modeling which was performed for Imperial County to support the conclusion for the annual PM-10 standard under Method 5.

A. Method 1

In EPA's General Preamble guidance, the first suggested method (Method 1) for determining the impact of emissions emanating from outside the U.S. is to "[p]lace several ambient PM-10 monitors and a meteorological station measuring wind speed and direction in the U.S. non attainment area near the international-border . . . [and] [e]valuate and quantify any changes in monitored PM-10 concentrations with a change in direction in the predominant wind direction."

As discussed in the NPR, there are six PM-10 monitors fn2 in the nonattainment area, with two monitors in the proximity of the border (Calexico-Grant St. and Calexico-Ethel St., each 1.2 km from the Mexican border). A meteorological station at the Imperial County Airport was used to provide a windrose fn3 for each exceedance day. The 179B(d) demonstration provided, for each exceedance day, an analysis of the transport of PM-10 from Mexico, based on the spatial distribution of PM-10 throughout the basin, along with a windrose, and a series of back trajectories (based on the National Oceanic and Atmospheric Administration HYSPLIT program).

(The spatial plots, windroses and trajectories .are included in Appendix A to Attachment 1.) The NPR provides a summary of the day-by-day analysis presented below.

PM-10 concentrations were recorded on seven days in the 1992-1994 time period. Each of the seven days which recorded a PM-10 concentration which exceeded the 24-hour PM-10 standard is discussed below. For each exceedance day, EPA first restates the analysis presented by the State, then, where relevant, EPA summarizes the analysis provided by the Imperial Valley/Mexicali Cross Border PM-10 Transport Study.fn4 This is followed by EPA's' conclusion.

1) January 19, 1993 (162 $\mu g/m^3$ at Brawley)

State's Demonstration: There is only one data point for the spatial plot (Brawley). The windrose for this day shows that there are 15 out of 24 hours with southerly wind directions that have the potential to carry emissions from Mexico into Imperial County. The back trajectories based on upper-air synoptic wind data suggest much higher winds and back trajectories that do not pass through Mexicali. The day is classified as a stagnant air day, therefore there is more separation between the surface winds and the winds aloft and greater weight is given to the surface data. The windrose suggests that emissions from Mexico contributed to the concentration measured at Brawley. Because the PM-10 exceedance on this day occurs when only one site was operating, there is insufficient information to draw any additional conclusions. However, given the closeness of the exceedance to the standard and the presence of surface winds with a

southerly wind component for over half the day, it appears likely that this exceedance would not have occurred but for transport from Mexico.

Summary of Imperial Valley/Mexicali Cross Border PM-10 Transport Study: The Imperial Valley/Mexicali Cross Border PM-10 Transport Study states that [. . . . 01/19/93 . . . .] was associated with stagnation conditions, and little transport took place. On [this] day, Calexico and Mexicali emissions might mingle on both sides of the border. It is unlikely, however, that sites in El Centro and Brawley would receive significant contributions from Mexican sources."

EPA Conclusion: EPA concurs with the State's conclusion that, given the number of hours with a southerly wind direction, and the closeness of the exceedance to the standard, it is likely that, but for transport from Mexico, this exceedance would not have occurred.

2) January 25, 199.3 (175 $\mu g/m^3$ at Brawley)

State's Demonstration: There is only one data point for the spatial plot (Brawley). The windrose for this day shows that there are 14 out of 24 hours with wind direction that have the potential to carry emissions from Mexico into Imperial County. The back trajectories suggest very high wind speeds that are obviously decoupled from the surface winds, which are very low. The day is classified as a stagnant air day. The windrose suggests that emissions from Mexico contributed to the concentration measured at Brawley.

This day is very similar in character to January 23, 1993 and the same conclusions apply.

Attachment 2 includes additional windroses for Imperial County and a more detailed analysis of windfields on January 25, 1993, indicating conditions that are "fairly stagnant in the lower half of Imperial County with a fairly significant southerly component that occurs 30% to 50% of the hours during the day. The CALMET windfields also suggest stagnant conditions with the winds ill defined but some southerly flow that suggests emissions from Mexico (south of UTMN 3615-km) likely were transported to the Brawley PM monitor (roughly 635-km UTME by 3650-km,UTMN). Given the amount of the PM emissions in Mexicali, the stagnant wind conditions in southern Imperial County, and the closeness the exceedance to the standard (175 $\mu g/m^3$) . . .," Imperial County is likely to have attained but for transport from Mexico. The additional windroses and CALMET windfields are presented in Attachment 2.

Summary of Imperial Valley/Mexicali Cross Border PM-l0 Transport Study: The Imperial Valley/Mexicali Cross Border PM-10 Transport Study states that ". . . January 25, 1993 had consistent flow from the northwest, which rules out transport from Mexico."

EPA Conclusion: Based on the more detailed windfield analysis, EPA concurs with the State's conclusion that there are stagnant conditions in southern Imperial County. Therefore, EPA believes that the State has presented a plausible analysis that the emissions from Mexico are likely to have contributed to the

concentrations measured at Brawley so that there would have been attainment but for transport.

3) August 23, 1993 (166 $\mu g/m^3$ at El Centro)

State's Demonstration: The spatial plot only has two data points at El Centro and Brawley but the more southerly monitor (El Centro) shows a much higher concentration. The windrose for that day shows that there are 19 out of 24 hours with wind directions that have the potential to carry emissions from Mexico into Imperial County and the back trajectory also shows that winds aloft carried air from Mexico into Imperial County. The day is not classified as a stagnation day, suggesting that the windrose and back trajectory are accurate. All analyses suggest that emissions from Mexico are impacting monitors in Imperial County.

Summary of Imperial Valley/Mexicali Cross Border PM-10 Transport Study: The Imperial Valley/Mexicali Cross Border PM-10 Transport Study states that "August 23, 1993 appeared to be dominated by transport."

EPA Conclusion: The spatial plot and windrose clearly show the potential for transport. The proximity to the border and the small magnitude of the exceedance support that, but for transport from Mexico, the PM-10 standard would have been attained.

4) July 7, 1994 (165 $\mu g/m^3$ at Calexico-Grant St.)

State's Demonstration: The spatial plot shows an exceedance at Calexico-Grant St. that is more than two times higher than any monitor in Imperial County.

The windrose shows that there are 17 out of 24 hours with wind directions that have the potential to carry emissions from Mexico into Imperial County and the back trajectory also shows that winds aloft carried' air from Mexico into Imperial County. The day is classified as -a stagnation day, suggesting that the windrose and back trajectory should be interpreted cautiously. The analyses, however, still strongly suggest that emissions from Mexico are impacting monitors in Imperial County.

EPA Conclusion: The spatial plot, the proximity of the Calexico-Grant St. monitor to the Mexican border, and windrose strongly support that, but for transport from Mexico, the PM-10 standard would have been attained.

5) August 6, 1994 (258 $\mu g/m^3$ and182 $\mu g/m^3$ at Calexico-Ethel St. and Calexico-Grant St., respectively)

State's Demonstration: The spatial plot shows exceedances at Calexico-Ethel St. and Calexico-Grant St., one of which is more than double the concentrations measured at more northerly sites in Imperial County. The windrose shows that there are 18 out of 24 hours with wind directions that have the potential to carry emissions from Mexico into Imperial County and the back trajectory also shows that winds aloft carried air from Mexico into Imperial County. The day is not classified as a stagnation day. All analyses suggest that emissions from Mexico are impacting monitors in Imperial County.

EPA Conclusion: The spatial plot and windrose support that, but for transport from Mexico, the PM-l0 standard would have been attained.

6) October 17, 1994 (159 µg/m^3 at Calexico-Grant St.)

State's Demonstration: The spatial plot shows decreasing concentrations moving north from Calexico. The windrose shows that there are 14 out of 24 hours with wind directions that have the potential to carry emissions from Mexico into Imperial County. The back trajectories do not show air being carried from outside of the U.S. to the impacted location. The day, however, is classified as a stagnant air day, therefore, there is more separation between the surface winds and the winds aloft and greater weight is given to the surface data. The single high PM10 concentration at Calexico-Grant St., which is in close proximity to Mexico, and windrose strongly suggest that this exceedance is likely due to emissions from Mexico.

EPA Conclusion: The spatial plot and windrose support that, but for transport from Mexico, the PM-10 standard would have been attained. In addition, the measured value is only slightly over the standard and in close proximity of the border.

7) December 16, 1994 (153 µg/m^3 at Calexico-Ethel St.)

State's Demonstration: The spatial plot shows decreasing concentrations moving north from Calexico. The windrose shows that there are 14 out of 24 hours with wind directions that have the potential to carry emissions from Mexico into Imperial County. The back trajectories do not show air being carried from outside of the U.S. to the impacted location. The day, however, is classified as a stagnant air day, therefore there is more separation between the

surface winds and the winds aloft and greater weight is given to the surface data. The single high PM10 concentration at Calexico-Ethel St., which is in close proximity to Mexico, and windrose suggest that this exceedance is potentially due to emissions from Mexico.

EPA Conclusion: The spatial plot and windrose support that, but for transport from Mexico, the PM-10 standard would have been attained. In addition, the measured value is slightly under the standard and in close proximity of the border.

B. Method 5

In EPA's General Preamble guidance, the fifth suggested method (Method 5) for determining the impact of emissions emanating from outside the U.S. is to. "[p]erform air dispersion and/or receptor modeling to quantify the relative impacts on the non-attainment area of sources on PM-10 emissions."

As discussed in the NPR, the State's 179B(d) demonstration included air dispersion modeling performed for 1992, 1993 and 1994. The dispersion modeling which used the emissions inventory for Imperial County and a reasonable background concentration of 25 $\mu g/m^3$ showed that Imperial County would have been in attainment of both the annual and 24-hour PM-10 standards but for PM-10 emissions from Mexico. However, the performance of the model relative to measured ambient concentrations could not be determined because emissions from Mexicali were not modeled. Therefore, the model performance could not be assessed by EPA, and, as a result, the Agency

believes that the modeling results are not sufficiently robust at this time to demonstrate that Imperial County would have been in attainment of the 24-hour PM-10 standards but for PM-10 emissions from Mexico.

The results of the modeling are more useful for the demonstration of the annual standard, which is less sensitive to model inputs. As discussed in the NPR, the modeling results indicate that the annual PM-10 standard would have been attained for each year from 1992-1994 at each of the monitoring sites Based on the proximity to the border, the magnitude of the Mexicali emissions and the modeling results, EPA believes, that the annual standard would have been attained at these sites but for the emissions from Mexico. The modeling inputs (meteorological data and inventory), model selection and modeling results (Table A and B) are discussed below.

1) Meteorological Data

The State's 1798 (d) demonstration used surface meteorological-data from the Imperial County Airport, with additional surface data from Calexico and Mexicali. Upper air data from San Diego (Miramar) and Tucson were also used.

2) Model Selection

The State's 179B(d) demonstration used the CALMET/CALPUFF modeling system for the 179B(d) demonstration. The selection of the modeling system was based on the ability of CALMET/CALPUFF to treat stagnation conditions

and its ability to process a large number. of days which was necessary to complete the analysis. The CALMET/CALPUFF modeling system offers a simplified treatment of secondary particulates, which is appropriate, given the small contribution of secondary particulates to exceedances in the Imperial County. EPA concurs that the model selection was appropriate.

3) Modeling Inventory

The 1997 modeling inventory was derived from the CARB Southern California Ozone Study modeling inventory for a typical summer day. Seasonal adjustments were made to the inventory and the inventory was scaled, based on population changes, for the years 1992 to 1994. The use of this inventory method to represent average annual PM-10 concentrations is acceptable. The use of this inventory method to represent peak PM-10 days is less reliable because emissions of PM-10 are likely to be higher than the seasonal average on peak days; however, this is currently the best available inventory for Imperial County.

4) Modeling Results

Full year model runs were performed for 1992, 1993, and 1994. The maximum predicted concentration of the annual standard at a monitoring site was 40.5 $\mu g/m^3$, 42.8 $\mu g/m^3$, and 41.6 $\mu g/m^3$ for the years 1992, 1993 and 1994, measured at the Calexico-Grant Street monitoring site. See Table A below.

TABLE A

Predicted concentrations at Imperial County monitors for full-year runs

(micrograms per meter cubed, $\mu g/m^3$)

year	PM-10 NAAQS	Receptor/Monitoring Sites					
		Brawley	Calexico-Ethel	Calexico-Grant	El Centro	Niland	Westmoreland
1992	annual	34.2	39.7	40.5	40.0	30.5	35.8
1993	annual	34.0	41.9	42.8	41.9	30.0	35.2
1994	annual	34.9	40.8	41.6	41.0	31.9	36.9

Footnotes

fn1 "State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 59 FR 41998, August 16, 1994.

fn2 There are currently seven PM-10 monitoring sites in Imperial County. The Calexico-East monitor was initiated in 1996. The data from this monitor are currently being reviewed by EPA and the California Air Resources Board (CARB) due to siting deficiencies based on federal monitoring guidelines in 40 CFR Part 58, Appendix E.

fn3 A windrose is a diagram showing the percentage-of time that wind blows from each compass direction for various ranges of wind speeds.

fn4 The Imperial Valley/Mexicali Cross Border PM-10 Transport Study (Final Report, January 30, 1997, Prepared for EPA Region IX by Desert Research Institute) also provided an analysis of transport for three of the days which exceeded the PM-10 standard. The report concluded that January 19, 1993 was determined to be associated with stagnation conditions, so that little transport took place. January 25, 1993 was determined to be not affected by transport. August 23, 1993 appeared to be dominated by transport.

fn5 Modeled annual average concentrations at all of the sites are below 43 $\mu g/m^3$ for each of the 3 years,

assuming only emissions from the United States side of the border.

fn6 The Southern California Ozone Study (SCOS) was a large-scale field measurement program carried out in southern California during the summer of 1997 to collect sufficient aerometric data to allow data, analysts and modelers to characterize and simulate ozone formation and fate in the region. Several agencies and others participated during the planning and operational phases of the field study, including GARB, EPA, local air districts, the US Navy, and the marine industry.

fn7 Since the applicable attainment date for the CAA section 179B(d) demonstration is December 31, 1994, post 1994 years were not addressed in the State's 179B(d) demonstration.

[Attachments 1 and 2 not reproduced here. The petition contains the relevant Excerpt of Record citations to this material.]

[Federal Register: October 19, 2001
(Volume 66, Number 203, Pages 53106-53112)]

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 81

[CA058-FOA; FRL-7087-1]

Clean Air Act Finding of Attainment; California-Imperial Valley Planning Area; Particulate Matter of 10 Microns or Less (PM-10)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to find that the State of California has established to EPA's satisfaction that the Imperial Valley Planning Area (Imperial County), a PM-10 moderate nonattainment area, would have attained the national ambient air quality tandards (NAAQS) for particulate matter of ten microns or less (PM-10) by the applicable Clean Air Act (CAA or the Act) attainment date, December 31, 1994, but for emissions emanating from outside the United States, i.e., Mexico. As a result of this final action, Imperial County will not be subject to a finding of failure to attain and reclassification to serious at this time and will remain a moderate PM-10 nonattainment area.

EFFECTIVE DATE: This action is effective on November 19, 2001.

ADDRESSES: You can inspect copies of the administrative record for this action at EPA's Region 9 office during normal business hours. U.S. Environmental Protection Agency, Region 9, Air Division, Planning Office (AIR-2), 75 Hawthorne Street, San Francisco, California 94105.

Electronic Availability: This document is also available as an electronic file on EPA's Region 9 Web Page at http://www.epa.gov/region09/air.

FOR FURTHER INFORMATION CONTACT: Doris Lo, U.S. Environmental Protection Agency, Region 9, Air Division, Planning Office (AIR-2), 75 Hawthorne Street, San Francisco, California 94105, (415) 744-1287, lo.doris@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Imperial County is a moderate PM-10 nonattainment area located on the California border with Mexico, with a December 31, 1994 attainment deadline. Under CAA section 188(b)(2)(A), moderate PM-10 nonattainment areas must be reclassified as serious by operation of law after the statutory attainment date if the Administrator finds that the area has failed to attain the NAAQS. However, CAA section 179(B)(d) provides that any area that establishes to the satisfaction of EPA that it would have attained the PM-10 NAAQS by the applicable attainment date but for emissions emanating from outside the United States shall not be subject to the provisions of CAA section 182(b).

Imperial County and the California Air Resources Board submitted evidence that the County would have attained the PM-10 NAAQS but for transport from Mexico. The primary information prepared by the Imperial County Air Pollution Control District (ICAPCD) is "Imperial County PM-10 Attainment Demonstration" (hereafter referred to as the "179B(d) Demonstration") which was transmitted to EPA by the California Air Resources Board (CARB) on July 18, 2001 letter from Michael P. Kenny, Executive Officer, CARB, to Ms. Laura Yoshii, Acting Regional Administrator, EPA Region 9).

Pursuant to CAA section 188(b)(2)(B) of the Act, EPA must publish a notice in the Federal Register identifying those areas that failed to attain the standard and reclassifying the areas to serious. On August 6, 2001, EPA issued two alternative proposals:

(1) To find that the State of California had established to EPA's satisfaction that Imperial County, a PM-10 moderate nonattainment area, would have attained the NAAQS PM-10 by the applicable Clean Air Act attainment date, December 31, 1994, but for emissions emanating from outside the United States, i.e., Mexico.

(2) Alternatively, to find that Imperial County did not attain the PM-10 NAAQS by its CAA mandated attainment date. This proposed finding was based on monitored air quality data for the PM-10 NAAQS during the years 1992-1994. A final action would result in a reclassification to serious PM-10 nonattainment for Imperial County.

These proposed alternative actions were published in a Federal Register notice (66 FR 42187) on August 10, 2001 (proposed rule or notice of proposed rulemaking, NPR). The 30-day public comment period ended on September 10, 2001. EPA requested public comments on both proposals and received ten comment letters from the following:

Sierra Club/EarthJustice Legal Defense Fund (David S. Baron, Attorney)

Imperial County Air Pollution Control District (Stephen L. Birdsall, Air Pollution Control Officer)

Congressman Duncan Hunter, U.S. House of Representatives, Washington, D.C. 20515-0552

Imperial Valley Vegetable Growers Association (Lauren S. Grizzle, Executive Director)

Imperial County Farm Bureau (Lauren S. Grizzle, Executive Director)

California Farm Bureau Federation (Cynthia L. Cory, Director, Environmental Affairs)

Mar Vista Farms, Inc. (Michael B. Cox, President)

Nisei Farmers League (Manuel Cunha, Jr., President)

California Cotton Ginners and Growers Association (Roger A. Isom, Vice President & Director of Technical Services)

Granite Construction Company (Jeff Mercer, Area manager)

All of the commenters supported EPA's proposed finding of attainment pursuant to section 179B(d) of the CAA, except for the Sierra Club/EarthJustice Legal Defense Fund (Sierra Club).

While the Sierra Club raises some important issues, EPA was aware of these issues prior to the proposed rulemaking and has not been convinced by Sierra Club that the State's 179B(d) demonstration is inadequate and that the finding of nonattainment and reclassification to serious should be finalized. Thus, EPA is finalizing its action to find that the State of California has established that Imperial County would have attained the NAAQS for PM-10 by the applicable CAA attainment date, December 31, 1994, but for emissions emanating from Mexico. Today's rulemaking provides EPA's responses to public comments and finalizes EPA's proposed action.

II. Public Comments and EPA Responses

A. Sierra Club/EarthJustice Legal Defense Fund (David S. Baron, Attorney)

Comments were submitted by the EarthJustice Legal Defense Fund on behalf of the Sierra Club. In general, the Sierra Club opposes our proposed finding of attainment and asserts that the 179B(d) demonstration does not adequately demonstrate attainment but for the emissions emananting from Mexico. The Sierra Club believes we must finalize our proposed finding of

nonattainment and reclassification to serious PM-10 nonattainment for Imperial County.

1. CAA Requires Modeling

The Sierra Club's first group of comments address the need for a modeling demonstration. The Sierra Club asserts that air quality modeling is a requirement under CAA Section 179B(d) and that in order to qualify for a 179B(d) waiver, the state must make a showing that is the equivalent of an attainment demonstration which the Act and EPA's own regulations and guidelines require to be based on air quality modeling. The Sierra Club then discusses how the State's air quality modeling does not adequately demonstrate attainment of the 24-hour and annual PM-10 NAAQS due to deficiencies with the modeling inventory and modeling assumptions which are summarized in EPA's responses below.

EPA's response: EPA disagrees with the Sierra Club that a CAA Section 179(B)(d) waiver must be based on air quality modeling. CAA section 179B(d) does not require air quality modeling for PM-10 nonattainment areas at international borders, and EPA's guidance relating to serious PM-10 nonattainment areas suggests modeling as one of five methods that may be used to determine attainment but for international transport.fn1 In issuing guidance on CAA section 179(B), EPA considered it appropriate to grant states more flexibility in making the "but-for" attainment determination for border areas due to the special difficulties that can be encountered at these areas.

For example, it may be particularly difficult for States to acquire the necessary input data for a valid modeling analysis, including monitored meteorological and air quality data, accurate speciated emissions inventories with temporal and spatial breakdown, and information on day-specific emissions, when such data must be collected in areas outside of the U.S. The acquisition of such data is resource intensive both in terms of money and expert staff time, and the exercise may consume years of preparatory work and then require additional time and expense for quality assurance and data preparation and analysis. In cases where the critical modeling input data are not available or are incomplete or inaccurate, EPA believes that Congress could not have intended to disallow areas from presenting, and EPA from approving, non-modeling evidence of "attainment but for transport."

Although modeling input data were recognized to be sparse, the State's 179B(d) demonstration did attempt to address each of the 5 allowable approaches specified in the General Preamble, including an air quality modeling "but-for" attainment demonstration for both the annual and 24-hour PM-10 NAAQS.

As discussed in the proposed rule, EPA did not base the proposed finding of attainment for the 24-hour PM-10 NAAQS on the State's air quality modeling demonstration. The sensitivity of the 24-hour PM-10 NAAQS to the modeling inputs, coupled with the lack of model validation, led EPA to conclude that, unlike the annual PM-10 NAAQS, the air quality modeling could not be relied upon for the 24-hour PM-10 NAAQS attainment demonstration. Instead, EPA based its finding of attainment for the 24-hour PM-10 NAAQS on

the State's analysis of monitoring sites, meteorological conditions (which involves an analysis of spatial plots, wind roses and back trajectories) and inventory estimates for both sides of the border. EPA believes that these are valid alternative methods for determining attainment but for international transport (see General Preamble at 59 FR 42001).

For the annual PM-10 NAAQS, model performance assessment also raises issues, although these concerns are less than for the 24-hour NAAQS because day-specific modeling inputs and predictions are not needed. Moreover, to determine whether or not Imperial County would have attained the annual PM-10 NAAQS but for international transport does not require modeling precision, due to the fact that the annual arithmetic mean concentrations for 1992-1994 are only slightly above the annual PM-10 NAAQS (51 g/m\3\ at Brawley and 56 g/m\3\ at Calexico Dichot-Grant Street). All that is required of the model in support of a "but for" demonstration is evidence that at least a small portion of the monitored concentrations was due to transport of pollution from Mexico.

2. Adequacy of the State's Emissions Inventory Input to the Modeling

The Sierra Club comments that the State's modeling inventory is insufficient because it was not developed for PM-10 modeling, does not reflect peak PM-10 levels, is not a "current" and "accurate" inventory, and does not contain data on actual PM-10 emissions, but is based on the SCOS inventory which is adjusted with invalid assumptions (i.e., percentage of TSP that is PM-10 and correlation of PM-10 emissions to population).

EPA Response: While the modeling inventory for Imperial County was not developed specifically for PM-10 modeling, it does include PM-10 emissions and represents the best available inventory at this time. As discussed in EPA's Technical Support Document (TSD) for the proposed rule, the modeling inventory was derived from the Southern California Ozone Study (SCOS) modeling inventory for a typical summer day. Seasonal adjustments were made to the inventory, and the inventory was scaled, based on population changes, for the years 1992 to 1994. The use of this modeling inventory to represent average annual PM-10 concentrations is an acceptable approach, but the use of this modeling inventory to represent peak PM-10 days is less reliable because emissions of PM-10 are likely to be higher than the seasonal average on peak days. In other words, this inventory is more reliable for the determining attainment of the annual PM-10 NAAQS than for the 24-hour PM-10 NAAQS.

EPA does not agree that the modeling inventory is insufficient because it is based on the SCOS inventory and adjustments made to that inventory (i.e., percentage of TSP that is PM-10 and correlation of PM-10 emissions to population). As discussed above, the modeling inventory developed is the best available inventory and information at this time. In order to develop a modeling inventory for Imperial County, the State took the SCOS modeling inventory and made adjustments to reflect the PM-10 emissions in Imperial county. For example, the SCOS inventory included emissions of total suspended particulates (TSP). PM-10 is a subset of TSP. In order to to adjust for the SCOS inventory for PM-10 emissions, the State used an adjustment factor of 1.93 which is based on a

comparison of the 1997 SCOS inventory to Imperial County's 1995 PM-10 emissions inventory (best available PM-10 inventory). The State also adjusted the inventory for changes in the population since the "vast majority of PM-10 emission in Imperial County are from area sources such as unpaved roads, paved roads and agriculture."fn2 While these may not be the most precise adjustment techniques for the Imperial County PM-10 modeling inventory, EPA believes these adjustments are reasonable for the annual PM-10 NAAQS.

In general, there are many uncertainties in developing PM-10 inventories. This is partly due to intrinsic variability, but also because socioeconomic surrogate data and location-specific data needed to build a spatially and temporally resolved inventory is sometimes not available. However, EPA believes that the fugitive PM-10 emission estimates and the modeling that uses them are an adequate basis for this action. The State is continuously improving and updating inventory information. The inventory used in the State's demonstration represents the best available PM-10 inventory for the 1992-1994 timeframe.

3. Background Concentration in the Model

The Sierra Club comments that there is no basis for using the annual background concentration of 25 g/m^3 and that it is "the product of pure speculation."

EPA Response: The background concentration level was based on a frequency distribution analysis of measured PM-10 concentrations at monitors in the Imperial County and Mexicali from 1992 to 2000.fn3

EPA believes the 25 g/m^3 background concentration level is a conservative level.

4. Secondary Particles in the Model

The Sierra Club comments that the State's modeling demonstration includes no analysis for secondary particle formation.

EPA Response: While there is no specific discussion of secondary particulates in EPA's proposed rule (66 FR 42187), the analysis provided by the state did account for the formation of secondary particulates. See Imperial County PM10 Attainment Demonstration, Chapter III.B, page 4. In addition the Imperial Valley/Mexicali Cross Border PM-10 Transport Study (Transport Study) provides a filter analysis which indicates that secondary particulates are measured in the range of 2 to 4 g/m^3 for secondary ammonium sulfates and 2 to 3 g/m^3 for secondary ammonium nitrates (Transport Study, Summary and Conclusion, page 9-5) and are thus a small portion of the particulate matter in Imperial County.

5. Proof That Mexico Emissions Impact U.S. Monitors and Adequacy of Alternative Demonstration

The Sierra Club asserts that the state has failed to demonstrate that PM-10 violations in Imperial County are actually being caused by emissions from Mexico and that, even if air quality modeling was not required, the state's "alternative" 179B(d) demonstration (i.e., based on analysis of wind patterns and population densities) is grossly inadequate. The Sierra Club believes that the State's analysis of wind patterns and population

densities does not show that any quantifiable amount of particulates traveled to the U.S. monitors, let alone any amount that would contribute to nonattainment and that there is nothing in the record relating to an actual amount of PM-10 emissions traveling from Mexico to Imperial County. Also, the Sierra Club states that the Imperial Valley/Mexicali Cross Border PM-10 Transport Study (Transport Study), which indicates that international transport is not always the cause of PM-10 violations, were not refuted and are more reliable than the more recent analysis by the state which the Sierra Club claims to be speculative. Finally, the Sierra Club asserts that there is no analysis of the PM-10 transport to Imperial County's border from places other than Mexico (i.e., on the U.S. side).

EPA's response: The State's 179B(d) demonstration, which includes a detailed analysis of spatial plots, wind roses and back trajectories for each of the PM-10 exceedance days during 1992-1994, provides the best qualitative analysis of the emissions from Mexico possible for the Imperial County area for the period in question. Filter analyses often can provide more specificity on where the monitoring emissions are coming from but, since the types of PM-10 sources are similar on both sides of the border, analysis of the Imperial County samples would not show what portion of the catch originated on the Mexican side of the border.fn4

The Sierra Club suggests that the analyses found in the State's 179B(d) demonstration prove nothing about whether or not emissions from Mexico are impacting U.S. monitors. EPA believes that given the available information, the State has made a good argument that

Imperial County is being impacted by Mexico emissions. Additional activities (tracer studies, air monitoring studies, establishment of more meteorology stations at border) could have been conducted, but it is not now possible to create information from new studies for the 1992-1994 timeframe. Thus, EPA believes that the State's 179B(d) analysis of spatial plots, wind roses and back trajectories provides the best determination of PM-10 emissions transport from Mexico.

EPA does not have to refute the Transport Study results in order to make this finding of attainment but for international transport. As discussed in the proposed rule, the additional windfield analyses (Attachment 2 to EPA's TSD, Additional windroses and windfields for January 25, 1993) provided a more detailed analysis, supplementing information from the Transport Study.fn5 The Transport Study is simply an effort to collect air quality data on exceedance days and analyze the data based on wind direction and speed, and the study is thus very similar to the analyses found in the State's demonstration. The Transport Study indicates that several of the exceedance days appear to have stagnant wind conditions (1/19/93, 1/25/93, 7/7/94, 10/17/94 and 12/16/94), but the State's demonstration uses more meteorological data and finds evidence that transport from Mexico is likely even with the stagnant conditions at the surface. For each of the exceedances, the State's analysis took into account additional information not included in the Transport Study. This information included: (a) The number of hours with southerly wind directions that have the potential to carry emissions from Mexico into Imperial County; (b) the back trajectories and back trajectories based on upper-air synoptic wind data, which show the existence

of much higher winds from the south that are decoupled from the surface stagnant conditions, and (c) the windroses developed for all meteorological stations, suggesting that emissions from Mexico likely contributed to the concentrations measured at Brawley. Based on this additional information and the further analyses, the State concluded that Imperial County would not have violated the PM-10 NAAQS but for transport from Mexico. In weighing the "but-for" evidence, EPA also considered it important to consider the relatively low level of the 24-hour exceedances (162 g/m^3), 175 g/m^3, 165 g/m^3, 159 g/m^3, and 153 g/m^3). EPA concedes that information is not available to determine with confidence the exact quantity of PM-10 coming from Mexico, but EPA continues to believe that the State has diligently collected and analyzed available evidence and has successfully demonstrated for each of the exceedance days the probability that Imperial County would not have violated the NAAQS but for the emissions emanating from Mexico.

Finally, EPA believes that there were insufficient data to support a modeling assessment of the potential for long range transport from the South coast or other California areas to Mexico and back again to Imperial. The Sierra Club presents no evidence that there is transport from U.S. sources outside of Imperial County. Even if evidence existed that the Imperial County monitors were being impacted by long range transport from within the U.S., such evidence would not invalidate the State's demonstration that Imperial County would have attained the NAAQS but for emissions emanating from Mexico.

6. Emissions Inventories

The Sierra Club asserts that the comparison of emissions inventories between Imperial and Mexicali is inadequate due to the uncertainty in the Mexicali inventory, that the Mexicali inventory has not been analyzed for transportability of particles and that the emissions inventory for Imperial County has never been approved by EPA, and thus cannot be used to support a "but-for" finding.

EPA's response: The comparison of Imperial and Mexicali emissions was intended to provide support for the attainment finding. EPA agrees that there is uncertainty in the Mexicali inventory, however, EPA also believes it is useful to examine all available data for this attainment finding. Even if the Mexicali emissions were one-half of 257, as suggested by the Sierra Club, the emissions in the city of Mexicali (200 square miles) would be about half of the emissions in all of Imperial County (4060 square miles), but the emissions density in Mexicali would still be much greater than in Imperial County. As far as determining the transportability of emissions from Mexicali, as discussed above and in the proposed rule, filter analyses have been examined for the border area and provided some information on the particles characteristics. Finally, as discussed above, the emission inventories used in the State's 179B(d) demonstration are the most current and best available. EPA plans to take action on the inventories when they are submitted as part of the State Implementation Plan (SIP) for Imperial County.

7. Post-1994 Exceedances

The Sierra Club asserts that the 179B(d) determination is inadequate because it fails to consider the post-1994 exceedances. The Sierra Club states that the post-1994 exceedances are numerous, in some cases extreme, and relevant to the attainment but for international transport determination.

EPA's response: EPA believes that the post-1994 exceedances are irrelevant to the determinations at issue. The statutory attainment date for the Imperial County PM-10 moderate nonattainment area is December 31, 1994. EPA believes the State's 179B(d) demonstration adequately demonstrates attainment by examining the air quality data from 1992-1994. If this demonstration is adequate, reclassification to serious is not required. Section 188(b)(2) provides that: "Within 6 months following the applicable attainment date for a PM-10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable attainment date * * *" the area shall be reclassified. While the second sentence of section 188(b)(2) contains the language quoted by the commentor "is not in attainment after the applicable attainment date," it is clear that in the context of the first sentence of the provision, which is the sentence that establishes the duty to make an attainment determination, the duty is to "determine whether the area attained the standard by that date [referring to the phrase "applicable attainment date" in the opening clause of the sentence]." Thus, EPA's duty is to determine whether the area attained by its attainment date and the

language in the second sentence regarding a finding after the attainment date may reasonably be interpreted as referring to the date the finding is made, which would necessarily be after the attainment date, not to the date used in the determination as the benchmark for determining attainment. The question of whether an area should be reclassified is considered along with whether an area has achieved attainment by the attainment date. Thus, the air quality data from the years 1992-1994 are the relevant data for determining whether Imperial County should be reclassified to serious.

8. SIP Requirements

Finally, the Sierra Club asserts that a 179B(d) waiver cannot be granted unless all moderate area SIP requirements (e.g., RACM, RACT, New Source Review, etc.) are being met.

EPA's response: As discussed in the EPA's proposal, this rulemaking does not address the SIP requirements for Imperial County but only the question of whether or not the State has established that Imperial County attained the NAAQS by December 31, 1994, but for international transport. CAA section 179B(d) states that "any State that establishes to the satisfaction of the Administrator * * * that such State has attained the national ambient air quality standard for [PM-10] by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be submit to the provisions of section 7512(b)(2) * * *" which requires reclassification upon failure to attain. This provision does not require a SIP submittal in order for the waiver to be granted. EPA is currently working

with the Imperial County Air Pollution Control District and the California Air Resources Board on developing an approvable State Implementation Plan for Imperial County. A draft of this plan was issued for public review in July 2001.

B. Other Comments Supporting EPA's Final Action

Besides the Sierra Club, all of the commentors support EPA's finding of attainment but for international transport and are extremely opposed to the finding of nonattainment and reclassification to a serious PM-10 nonattainment area. Commentors discussed the overwhelming pollution problem coming from Mexico, the measures their industries have taken to reduce pollution and that it would be unfair to impose additional controls on sources in Imperial County. The Imperial County Air Pollution Control District also provided additional technical analysis supporting the methods used in the State's 179B(d) demonstration.

III. Summary of Final Action

EPA's proposed rule (66 FR 42187) discusses how the State's 179B(d) demonstration is based on a competently collected and examined set of the relevant available information, and reaches a reasoned conclusion that each of the 1992-94 exceedances, which are only slightly above the NAAQS, would likely not have occurred without pollutant transport from Mexico.

In summary, EPA continues to believe that CAA section 179B(d) does not mandate a modeling demonstration, and that the State has provided evidence sufficient to show that, but for international

transport of PM-10, Imperial County would have attained the annual and 24-hour PM-10 NAAQS by the December 31, 1994 deadline.

IV. Administrative Requirements

A. Executive Order 12866

Under E.O. 12866, 58 FR 51735 (October 4, 1993), EPA is required to determine whether regulatory actions are significant and therefore should be subject to OMB review, economic analysis, and the requirements of the Executive Order. The Executive Order defines a "significant regulatory action" as one that is likely to result in a rule that may meet at least one of the four criteria identified in section 3(f), including, (1) have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients therof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that the final finding of attainment pursuant to CAA section 179B(d) would result in none of the effects identified in section 3(f). A finding of attainment under section 179B(d) of the CAA does not impose any additional requirements on an

area. This actions does not, in-and-of-itself, impose any new requirements on any sectors of the economy.

B. Executive Order 13211

The final finding of attainment under CAA 179B(d) is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 Fed. Reg. 28355 (May 22, 2001)) because it is not a significant regulatory actions under Executive Order 12866.

C. Executive Order 13045

Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The final finding of attainment under CAA 179B(d) is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13132

Executive Order 13132, "Federalism," (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, "Federalism," and 12875, "Enhancing the Intergovernmental Partnership." Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

The final finding of attainment will not have substantial direct effects on California, on the relationship between the national government and California, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. As stated above, a finding of attainment

under section 179B(d) of the CAA does not impose any additional requirements on an area. This action does not, in-and-of-itself, impose any new requirements on any sectors of the economy. Thus, the requirements of section 6 of the Executive Order do not apply to this final action.

E. Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

The final finding of attainment under CAA 179B(d) does not have tribal implications. For the reasons discussed above, the final action will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

As discussed above, the final finding of attainment under CAA 179B(d) does not impose additional requirements on small entities. Therefore, I certify that this final action will not have a significant economic impact on a substantial number of small entities.

G. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

With respect to EPA's final finding of attainment under CAA 179B(d), EPA notes that this actions in-and-of itself establishes no new requirements. Furthermore, EPA is not directly establishing any regulatory requirements that may significantly impact or uniquely affect small governments, including tribal governments. Thus, EPA is not obligated to develop under section 203 of UMRA a small government agency plan.

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to today's final action because they do not require the public to perform activities conducive to the use of VCS.

I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will

submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rule is not a "major" rule as defined by 5 U.S.C. 804(2).

J. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 18, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401-7671q.

Dated: October 9, 2001.
Sally Seymour,
Acting Regional Administrator, Region IX.
[FR Doc. 01-26406 Filed 10-18-01; 8:45 am]

BILLING CODE 6560-50-P

Footnotes

fn1 EPA's guidance appears in "State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 59 FR 41998, August 16, 1994. The guidance lists 5 types of information that could be used to qualify for treatment under section 179B, and provides that "States may use one or more of these types of information or other techniques, depending on their feasibility and applicability, to evaluate the impact of emissions emanating from outside the U.S. on the nonattainment area." The General Preamble goes on to note that "the first 3 examples do not require the State to obtain information from a foreign country." Only the fifth method employs modeling. 59 FR 42001. As discussed in the proposed action, the State submitted information addressing each of the 5 methods. 66 FR 42189-90.

fn2 See the State's 179B(d) demonstration (Chapter III.B. Modeling Emissions Inventory) for more detailed information on the how the State's modeling inventory was developed.

fn3 See the State's 179B(d) demonstration (Chapter III.D. Background Concentrations) for more information.

fn4 As discussed in the proposed rule, the 1992-1993 Imperial Valley/Mexicali Cross Border PM-10

Transport Study (Final Report, January 30, 1997) includes an analysis of the particles collected in areas within Imperial County where violations have been recorded. This sample analysis determined that geological dust (70-90%), motor vehicle exhaust (10-15%) and vegetative burning (10%) account for the highest contribution to PM-10 concentrations. These are the predominant emissions sources on both sides of the border. Thus, the filter analysis by itself could not be used to determine the extent to which violations might result from international transport.

fn5 See Attachment 2 to EPA's TSD, Additional windroses and windfields for January 25, 1993.

[Federal Register: August 16, 1994
(Volume 59, Number 157, Pages 41998-42002)]

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-5052-2]

State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990

AGENCY: Environmental Protection Agency (EPA).

ACTION: Addendum to General Preamble for future proposed rulemakings.

SUMMARY: This addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 principally describes EPA's preliminary views on how the Agency should interpret various provisions of title I with regard to requirements for PM-10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) serious nonattainment area State implementation plans (SIP's). This document also addresses policy and guidance on attainment date waivers potentially applicable to all areas that have been designated nonattainment for PM-10, waivers of certain requirements applicable to PM-10 serious nonattainment areas, and requirements for international border areas in PM-10 nonattainment

areas. Although the guidance includes various statements that States must take certain actions, these statements are made pursuant to EPA's preliminary interpretations, and thus do not bind States and the public as a matter of law. This addendum is an advance notice of how EPA generally intends to take action on SIP submissions and to interpret various PM-10 related title I provisions.

FOR FURTHER INFORMATION CONTACT: Charlene E. Spells, Air Quality Management Division, Mail Drop 15, Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, (919) 541-5255.

ADDRESSES: References cited herein are available from the Public Docket No. A-92-23. The docket is located at the Air and Radiation Docket and Information Center, Room M-1500, Waterside Mall, Mail Code 6102, 401 M Street SW., Washington, DC 20460. The docket may be inspected from 8:30 a.m. to 12 noon and from 1:30 p.m. to 3:30 p.m. on weekdays, except for legal holidays. A reasonable fee may be charged for copying.

Supplementary Information:

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In accordance with 1 CFR 5.9(c), this document is published in the proposed rules category.

I. Introduction

Issues are discussed in this document regarding policy and guidance that will be applicable to areas that have

been designated nonattainment for PM-10 and reclassified as serious areas. This document also discusses issues regarding policy and guidance on attainment date waivers potentially applicable to all areas that have been designated nonattainment for PM-10, as well as policy and guidance on waivers of certain other requirements applicable to PM-10 serious nonattainment areas, and requirements for international border areas in PM-10 nonattainment areas.

Initially, all areas designated as nonattainment for PM-10 are classified as moderate areas (see section 188(a) of the Clean Air Act (Act)).fn1 Subsequently, in accordance with section 188(b) of the Act, "The Administrator may reclassify as a serious PM-10 nonattainment area * * * any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM-10 by the attainment date (as prescribed in subsection (c)) for moderate areas" or any area that fails to timely attain. The EPA took final action on January 8, 1993 to reclassify 5 moderate areas that were initially designated as nonattainment for PM-10 upon enactment of the 1990 Amendments (see 58 FR 3334). The EPA is considering reclassifying additional areas from moderate to serious.

This guidance document is being published as an addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 (General Preamble) published April 16, 1992 (57 FR 13498).fn2 Among other things, this PM-10 nonattainment area guidance document describes EPA's preliminary views on how EPA should

interpret various provisions of title I with regard to requirements for PM-10 serious area SIP's. Although the guidance includes various statements that States must take certain actions, these statements are made pursuant to EPA's preliminary interpretations, and thus do not bind the States and the public as a matter of law. Of course, the use of prescriptive language is appropriate in those instances where the policy is simply reiterating statutory mandates which provide that States must take certain actions.

- Possible approaches to implementing the provisions in section 179B applicable to international border areas, general SIP requirements of section 172(c), the specific requirements in subpart 4 of part D of title I in serious PM-10 nonattainment areas, the issues involved and the means of resolving those issues are discussed in the following sections. The topics discussed include SIP requirements such as provisions to assure that best available control measures (BACM) are implemented; waivers for areas impacted by nonanthropogenic sources; treatment of international border areas; requirements for quantitative milestones, reasonable further progress (RFP) and contingency measures.

II. Designations and Classifications

A. Designations

Section 107(d) of the Act provides generally for the designation of areas of each State as attainment, nonattainment or unclassifiable for each pollutant for which there is a national ambient air quality standard (NAAQS). Certain areas meeting the qualifications of section 107(d)(4)(B) of the Act were designated

nonattainment for PM-10 by operation of law upon enactment of the 1990 Amendments (initial PM-10 nonattainment areas). A Federal Register notice announcing all of the areas designated nonattainment for PM-10 at enactment and classified as moderate was published on March 15, 1991 (56 FR 11101). A follow-up notice correcting some of these area designations was published August 8, 1991 (56 FR 37654). The nonattainment areas were formally codified in 40 CFR part 81, effective January 6, 1992 (56 FR 56694, November 6, 1991). All those areas of the country not designated nonattainment for PM-10 at enactment were designated unclassifiable (see section 107(d)(4)(B)(iii) of the Act).

B. Classifications

Once an area is designated nonattainment, section 188 of the Act outlines the process for classification of the area and establishes the area's attainment date. In accordance with section 188(a), all PM-10 nonattainment areas are initially classified as moderate by operation of law upon their designation as nonattainment.

C. Reclassifications

1. General Conditions

A moderate area can subsequently be reclassified as a serious nonattainment area under two general conditions. First, EPA has general discretion under section 188(b)(1) to reclassify a moderate area as a serious area at any time the Administrator determines

the area cannot practicably attain the NAAQS by the statutory attainment date for moderate areas.fn3

Second, under section 188(b)(2) a moderate area is reclassified as serious by operation of law after the statutory attainment date has passed if the Administrator finds that the area has not attained the NAAQS. The EPA must publish a Federal Register notice identifying the areas that have failed to attain and were reclassified, within 6 months following the attainment date (see section 188(b)(2)(B)).

2. Reclassification of Initial PM-10 Nonattainment Areas

Section 188(b)(1)(A) provides an accelerated schedule by which EPA is to reclassify appropriate initial PM-10 nonattainment areas. The EPA proposed on November 21, 1991 (56 FR 58656) to reclassify 14 of the 70 initial moderate areas as serious. The 14 areas EPA proposed to reclassify were identified largely based on the magnitude and frequency of ambient PM-10 measurements above the 24-hour NAAQS of 150 micrograms per cubic meter (<greek-m>g/m<SUP>3) during calendar years 1988-1990. The EPA took final action on January 8, 1993 (58 FR 3334) to reclassify 5 of the 14 areas. The final decision to reclassify the 5 areas was based on the criteria utilized in the proposal, comments received in response to the proposal and on EPA's preliminary review of the SIP's for the areas.

In the future, EPA anticipates that, generally, any decision to reclassify an initial PM-10 nonattainment area before the attainment date will be based on specific facts or circumstances demonstrating that the

NAAQS cannot practicably be attained in the area by December 31, 1994 (the statutory attainment date specified in section 188(c)(1) for initial PM-10 nonattainment areas).

3. Reclassification of Future PM-10 Nonattainment Areas

Section 188(b)(1)(B) provides a timeframe within which EPA is to reclassify appropriate areas designated nonattainment for PM-10 subsequent to enactment of the 1990 Amendments. Appropriate areas are to be reclassified as serious within 18 months after the required date for the State's submission of a moderate area PM-10 SIP.fn4 The statute requires that these moderate area PM-10 SIP's be submitted within 18 months after the area is designated nonattainment (see section 189(a)(2)(B)). Taking these provisions together, the statute thus requires that EPA reclassify appropriate PM-10 moderate areas designated nonattainment after 1990 as serious within 3 years of such designation.

Because the moderate area SIP's are due before this reclassification deadline, EPA anticipates that any determination that such areas should be reclassified will be based upon facts contained in the moderate area SIP demonstrating that the NAAQS cannot practicably be attained by the statutory deadline. The EPA may also consider reclassifying moderate areas for which a SIP has not been submitted whenever it becomes apparent (e.g., because of an extensive delay in submitting the SIP) that an area cannot practicably attain the standards by the applicable attainment date. The EPA may also determine that an area cannot

practicably attain the standards by the applicable date when the State submits an incomplete or otherwise inadequate SIP for the area (i.e., a SIP which would not assure timely attainment) and the State does not act expeditiously to correct such deficiencies.

The EPA does not believe that generally reclassifying moderate areas as serious rewards areas which delay development and implementation of PM-10 control measures. Rather, EPA believes its policy creates an incentive for the timely submittal and effective implementation of moderate area SIP requirements and facilitates the PM-10 attainment objective. For example, if an area that fails to submit a timely moderate area SIP is reclassified, this does not obviate the requirement that the area submit and implement the moderate area SIP requirements. Accordingly, in addition to reclassifying such areas, EPA would also determine that the State had failed to submit a PM-10 SIP and the area could be subject to sanctions under sections 110(m) and 179 for its delay. As provided under section 179(a) of the Act, States containing areas for which EPA has made such determinations have up to 18 months from EPA's determination to submit a complete plan or plan revision before EPA is required to impose either the highway funding sanction or the requirement to provide two-to-one new source offsets described in section 179(b). If the deficiency has not been corrected 6 months after the first sanction applies, then the second sanction must apply.fn5 The EPA's determination also triggers a requirement for EPA to impose a Federal implementation plan under section 110(c)(1) of the Act. In conjunction with the possible imposition of sanctions, EPA may issue a determination to reclassify the area to serious.

D. Appendix K and Waivers

Appendix K to 40 CFR part 50 provides guidance on the interpretation of ambient air quality data to determine the air quality status of an area. Appendix K and accompanying guidance (both preceding the 1990 Amendments to the Act) provide in part that measured exceedances of the PM-10 NAAQS which are believed to be influenced by uncontrollable events caused by natural sources of particulate matter or by events that are not expected to recur at a given location are flagged and excluded from decisions as to whether or not the area should be designated nonattainment.fn6 Therefore, if it is established that exceedances are caused by natural sources, a State may be permitted to avoid designating the area as nonattainment, even though the exceedances are expected to recur.

The savings provision of section 193 of the amended Act provides, among other things, that regulations and guidance promulgated or issued by the Administrator prior to enactment of the 1990 Amendments are to remain in effect according to their terms except to the extent that they are inconsistent with any provision of the amended Act. Section 188(f) of the amended Act provides EPA with the discretionary authority to waive a specific date of attainment for a PM-10 nonattainment area where it is determined that nonanthropogenic sources contribute significantly to the violation of the standard in the area, and to waive certain nonattainment area SIP requirements where the Administrator determines that anthropogenic sources of PM-10 do not contribute significantly to the violation of the standard in the area. These provisions take as a fundamental premise that areas experiencing

violations of the NAAQS due to nonanthropogenic sources are to be designated as nonattainment. If areas were permitted to avoid being designated as nonattainment because their violations are caused in whole or part by uncontrollable natural events, then this statutory provision would have to be read as having no legal effect or significance. However, this would violate canons of statutory construction, which direct that statutory language not be treated as mere surplusage.

Consequently, although appendix K appears to be preserved in part by section 193, the provision permitting the treatment of "uncontrollable events caused by natural sources" as exceptional events, and therefore excludable from nonattainment decisions, is inconsistent with the provisions of section 188(f) and should therefore be regarded as no longer having legal effect. Similarly, any EPA guidance permitting such exclusion of these events is inconsistent with the amended Act. For this reason, exceedances which are attributable to uncontrollable nonanthropogenic events may not be discounted or deweighted in any manner, but must be fully considered in determining whether violations of the NAAQS have occurred and whether designation as nonattainment is warranted. Future determinations relevant to exceptional events should therefore focus on the remaining type of exceptional event identified under section 2.4 of 40 CFR part 50, appendix K, namely whether the events--anthropogenic or nonanthropogenic--are likely to recur at the same location.

The EPA plans to make perfunctory modifications to section 2.4 of 40 CFR part 50, appendix K. In addition,

guidance on the interpretation of air quality data believed to be influenced by special events and conditions will be addressed in a separate publication that will replace the 1986 Exceptional Events Guideline.

III. International Border Areas

A. Statutory Requirement

Section 818 of the 1990 Amendments added a new section, 179B, to subpart 1, part D of title I. Section 179B applies to areas that could attain the relevant NAAQS by the statutory attainment date but for emissions emanating from outside the United States (U.S.). For PM-10 nonattainment areas, section 179B(a) provides that EPA must approve the moderate area SIP if (1) the SIP meets all the applicable requirements under the Act other than a requirement that such plan or revision demonstrate attainment and maintenance of the PM-10 NAAQS by the applicable attainment date, and (2) the State demonstrates to EPA's satisfaction that the SIP would be adequate to attain and maintain the PM-10 NAAQS by the attainment date but for emissions emanating from outside the U.S. In addition, section 179B(d) provides that if a State demonstrates that an area would have timely attained the PM-10 NAAQS but for emissions emanating from outside the U.S., the area must not be subject to the reclassification provisions of section 188(b)(2). Section 188(b)(2) provides that any moderate PM-10 nonattainment area that EPA determines is not in attainment after the applicable attainment date shall be reclassified to serious by operation of law. Therefore, the statute provides that areas that could attain but for emissions

emanating from outside the U.S. must not be reclassified as serious after failing to attain by the applicable date.fn7

B. Policy

Assuming that a plan or revision meets all applicable requirements, the State must show that an area is eligible to have its SIP approved and not be reclassified as serious under section 179B by evaluating the impact of emissions emanating from outside the U.S. and demonstrating that the SIP would bring about attainment but for those emissions. Several types of information may be used to evaluate the impact of emissions emanating from outside the U.S. The EPA will consider the information presented by the State for individual nonattainment areas on a case-by-case basis in determining whether an area may qualify for treatment under section 179B. Five examples of such information are listed below in increasing order of sophistication (the State may use one or more of these types of information or other techniques, depending on their feasibility and applicability, to evaluate the impact of emissions emanating from outside the U.S. on the nonattainment area; the first three examples do not require the State to obtain information from a foreign country):

1. Place several ambient PM-10 monitors and a meteorological station, measuring wind speed and direction, in the U.S. nonattainment area near the international border.fn8 Evaluate and quantify any changes in monitored PM-10 concentrations with a change in the predominant wind direction.

2. Comprehensively inventory PM-10 emissions within the U.S. in the vicinity of the nonattainment area and demonstrate that the impact of those sources on the nonattainment area after application of reasonably available controls does not cause the NAAQS to be exceeded. This analysis must include an influx of background PM-10 in the area. Background PM-10 levels could be based, for example, on concentrations measured in a similar nearby area not influenced by emissions from outside the U.S.

3. Analyze ambient sample filters for specific types of particles emanating from across the border (although not required, characteristics of emissions from foreign sources may be helpful).

4. Inventory the sources on both sides of the border and compare the magnitude of PM-10 emissions originating within the U.S. to those emanating from outside the U.S.

5. Perform air dispersion and/or receptor modeling to quantify the relative impacts on the nonattainment area of sources located within the U.S. and of foreign sources of PM-10 emissions (this approach combines information collected from the international emission inventory, meteorological stations, ambient monitoring network, and analysis of filters).

In addition to demonstrating that the SIP for the area would be adequate to timely attain and maintain the NAAQS but for emissions emanating outside the U.S., the SIP must continue to meet all applicable moderate area SIP requirements in order to qualify for the special SIP approval under section 179B. Among other

things, the SIP must provide for the implementation of reasonably available control measures (RACM), including reasonably available control technology (RACT) (see 57 FR 13540). In international border areas, RACM/RACT must be implemented to the extent necessary to demonstrate attainment by the applicable attainment date if emissions emanating from outside the U.S. were not included in the analysis. The EPA believes that this interpretation of the degree of RACM the State is required to implement in moderate PM-10 areas affected by emissions emanating from outside the U.S. is consistent with the purpose of section 179B. By directing EPA, under section 179B, to approve the plan or plan revision of a moderate PM-10 area which shows it would attain the NAAQS but for foreign emissions and by excluding such an area from reclassification to serious, Congress clearly wanted to avoid penalizing States containing such areas by not making them responsible for control of emissions emanating from a foreign country over which they have no jurisdiction. Moreover, by excluding the area from reclassification, Congress also elected to avoid subjecting such areas to the more stringent control measures applicable in serious PM-10 areas. In addition, as set forth in section 179B(a)(2), the second condition which must be met before EPA may approve a moderate area plan showing attainment but for foreign emissions, by its plain terms, requires the State to establish only that the plan submitted would be "adequate" to timely attain and maintain the NAAQS, but for emissions from outside the U.S. Nothing in section 179B relieves the State from meeting all its applicable moderate area PM-10 SIP requirements, including the requirement to implement RACM. Nonetheless, if, in doing so, States containing such an

area were also required, because of contributions to PM-10 violations caused by foreign emissions, to shoulder more of a regulatory and economic burden than States not similarly affected (i.e., by implementing measures which go well beyond those which the SIP demonstrates would otherwise be adequate to timely attain and maintain the PM-10 NAAQS) such a requirement would unfairly penalize States containing international border areas and effectively undermine the purpose of section 179B. Indeed, to the extent an affected State can satisfactorily demonstrate that implementation of such measures clearly would not advance the attainment date, EPA could conclude they are unreasonable and hence do not constitute RACM. Notwithstanding the above, in light of the overall health and clean air objectives of the Act, EPA does encourage affected States to reduce emissions beyond the minimum necessary to satisfy the "but for" test in order to reduce the PM-10 concentrations to which their populations are exposed. The SIP for an international border area must also include contingency measures as required under section 172(c)(9) of the Act. Under section 179B(a)(1), such SIP's must meet "all the requirements applicable to it under the Act" except that they may demonstrate timely attainment by discounting emissions emanating from outside the U.S. Contingency measures are additional measures included in the SIP that can be undertaken to reduce emissions if the area fails to make RFP or to attain the primary NAAQS by the applicable attainment date. In international border areas, EPA will not require the contingency measures for PM-10 to be implemented after the area fails to attain if EPA determines that the area would have attained the NAAQS, but for emissions emanating from outside the U.S. However,

the EPA will require contingency measures to be implemented if it determines that the area failed to make RFP in achieving the required reductions in PM-10 emissions from sources within the U.S., or if the area does not, in fact, obtain the emission reductions that were necessary to demonstrate timely attainment of the NAAQS, but for emissions emanating from outside the U.S.

IV. Serious Area SIP Requirements

The Act requires States to submit several SIP revisions, as necessary, providing for implementation of increasingly stringent control measures and demonstrating when those control measures will bring about attainment of the PM-10 NAAQS. The first SIP revision was due November 15, 1991 for the initial moderate PM-10 nonattainment areas. For areas redesignated nonattainment for PM-10 in the future under section 107(d)(3), the first SIP revision will be due within 18 months after the area is redesignated (see section 189(a)(2)). This SIP revision must, among other things, provide for implementation of RACM on sources in the area (see sections 189(a)(1)(C) and 172(c)(1)). All available technologically and economically feasible control measures would be considered RACM, and therefore reasonable for adoption, for areas that cannot attain the NAAQS by the applicable attainment date (December 31, 1994 for initial moderate PM-10 nonattainment areas) (see 57 FR 13544).fn9

If EPA determines that a moderate area cannot practicably attain the NAAQS by the applicable attainment date (or determines the area has failed to

attain) and reclassifies the area as a serious nonattainment area under section 188(b), a second SIP revision for the area is required under section 189(b). This revision must, among other things, include provisions to assure that BACM (including BACT) will be implemented in the area (see section 189(b)(1)(B)). In addition, a demonstration (including air quality modeling) must be submitted showing that the plan will attain the NAAQS either by the applicable attainment date or, if an extension is granted under section 188(e), by the most expeditious alternative date practicable (see section 189(b)(1)(A)).

The SIP revisions to require the implementation of BACM must be submitted to EPA within 18 months after an area is reclassified as serious (see section 189(b)(2)). The BACM are to be implemented no later than 4 years after an area is reclassified (see section 189(b)(1)(B)). The EPA's policies regarding the requirement to implement BACM in serious areas are discussed in section VI of this document.

The serious area attainment demonstration required under section 189(b)(1)(A) must be submitted to EPA within 4 years after an area is reclassified based on a determination by EPA that the area cannot practicably attain the NAAQS by the statutory deadline for moderate areas. It is due within 18 months after an area is reclassified for actually having failed to attain the NAAQS by the moderate area attainment date (see section 189(b)(2)).

The new attainment date for initial PM-10 nonattainment areas that are reclassified as serious is to be as expeditious as practicable but not later than

December 31, 2001. For areas that are designated nonattainment for PM-10 in the future and subsequently become serious, the attainment date is to be as expeditious as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment (see section 188(c)(2)).

If the State demonstrates to the satisfaction of EPA that attainment by the statutory deadline for serious areas (as set forth in section 188(c) of the Act) is impracticable, the State must demonstrate that the SIP provides for attainment by the most expeditious alternative date practicable. The State may apply to EPA for a single extension of the serious area attainment date, under section 188(e) of the Act, not to exceed 5 years beyond the serious area attainment date. A State requesting an extension under section 188(e) for an area must, among other things, demonstrate that the plan for the area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area. The EPA intends to issue guidance in the future, as appropriate, on applying for an extension of the serious area attainment date.

If a serious area fails to attain by the applicable attainment date (which may be an extended attainment date), another SIP revision is required within 12 months that provides for attainment and until then for annual reductions in PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most

recent emission inventory for the area (see section 189(d)).

In addition to the specific PM-10 SIP requirements contained in subpart 4 of part D, title I, States containing serious areas must meet all of the applicable general SIP requirements set forth in section 110(a)(2) and the nonattainment area SIP requirements set forth in subpart 1 of part D, title I, to the extent that these provisions are not otherwise subsumed by, or integrally related to, the more specific PM-10 requirements.fn10 The general SIP requirements applicable to all nonattainment areas are discussed in the General Preamble at 57 FR 13556-13557.

The requirements specifically applicable to serious areas under subpart 4 are found primarily in section 189. Those requirements include:

a. Current actual and allowable emissions inventories that meet EPA guidelines fn11 (see section VI.D. below).

b. Submission of a SIP, under section 189(b)(1)(A), that includes a demonstration that the plan provides for attainment by the applicable attainment date (December 31, 2001 for the areas initially designated nonattainment for PM-10 by operation of law under section 107(d)(4) and no later than the end of the tenth year beginning after the area's redesignation for areas subsequently redesignated nonattainment), or a demonstration that attainment by the above date is not practicable and that the plan provides for attainment by the most expeditious alternative date practicable.fn12

Footnotes

fn1 The 1990 Amendments to the Clean Air Act made significant changes to the air quality planning requirements for areas that do not meet (or that significantly contribute to ambient air quality in a nearby area that does not meet) the PM-10 national ambient air quality standards (see Pub. L. No. 101-549, 104 Stat. 2399). References herein are to the Clean Air Act, as amended, 42 U.S.C. 7401, et seq.

fn2 A supplemental notice was published at 57 FR 18070, April 28, 1992, which provides certain appendices to the April 16, 1992 General Preamble. Subsequent references in this notice to the General Preamble are inclusive of both documents.

fn3 The EPA's interpretation of the reclassification provisions in section 188(b)(1) is discussed in detail in section III.C.1(b) of the General Preamble (57 FR at 13537-38).

fn4 This directive does not restrict EPA's general authority, but simply specifies that it is to be exercised, as appropriate, in accordance with certain dates.

fn5 See 58 FR 51270 (October 1, 1993).

fn6 See section 2.4 of appendix K of 40 CFR part 50 and "The Guideline on the Identification and Use of Air Quality Data Affected by Exceptional Events," EPA-450/4-86-007, July 1986.

fn7 As noted, section 179B(d) states that areas demonstrating attainment of the standards, but for

emissions emanating from outside the U.S., shall not be subject to section 188(b)(2) (reclassification for failure to attain). By analogy to this provision and applying canons of statutory construction, EPA will not reclassify before the applicable attainment date areas which can demonstrate attainment of the standards, but for emissions emanating from outside the U.S. (see section 188(b)(1)). First, section 179B evinces a general congressional intent not to penalize areas where emissions emanating from outside the country are the but-for cause of the PM-10 nonattainment problems. Further, if EPA were to reclassify such areas before the applicable attainment date, EPA, in effect, would be reading section 179B(d) out of the statute. Specifically, if EPA proceeded to reclassify, before the applicable attainment date, those areas qualifying for treatment under section 179B, an area would never be subject to the provision in section 179B(d) which prohibits EPA from reclassifying such areas after the applicable attainment date. Canons of statutory construction counsel against interpreting the law such that language is rendered mere surplusage. Finally, note that section 179B(d) contains a clearly erroneous reference to carbon monoxide instead of PM-10, and that this section contains other clear errors (see, e.g., section 179B(c) reference to section 186(b)(9), which does not exist).

fn8 See 40 CFR part 58 for guidance on locating PM-10 monitors and "On-site Meteorological Program Guidance for Regulatory Modeling Applications," EPA-450/4-87-013, June 1987 for guidance on locating meteorological stations.

fn9 Note that if it can be shown that measures are unreasonable because emissions from the sources

affected are insignificant or de minimis, such measures may be excluded from consideration as they would not represent RACM for that area (see 57 FR 13540). Moreover, in international border areas, measures which go beyond those which the SIP demonstrates would be adequate to attain and maintain the standard, but for emissions emanating from outside the U.S., would not be considered "reasonably" available--and therefore would not be required by RACM--since they would not advance the attainment date (although States may elect to implement such measures in order to reduce the public's exposure to PM-10) (see discussion under International Border Areas of this guidance document).

fn10 See 57 FR 13538 (April 16, 1992).

fn11 "PM-10 Emission Inventory Requirements," EPA-450/2-93-XX, U.S. Environmental Protection Agency, Research Triangle Park, NC, 1993.

fn12 Subsequent to adopting requirements for BACM shortly after the nonattainment area is reclassified as serious, it may be necessary for the State to adopt additional control measures in order to demonstrate that the SIP provides for attainment of the PM-10 NAAQS in accordance with section 189(b)(1)(A)(i). If the State demonstrates, in accordance with section 189(b)(1)(A)(ii), that attainment by the applicable serious area attainment date is impracticable and seeks an extension of the attainment date pursuant to section 188(e), the State must demonstrate to the best of its ability that the plan for the area includes the most stringent measures that are included in the implementation plan of any State or are achieved in

practice in any State, and can be feasibly implemented in the area.

Code of Federal Regulations
Title 40, Section 50.6

§ 50.6 National primary and secondary ambient air quality standards for PM10.

(a) The level of the national primary and secondary 24-hour ambient air quality standards for particulate matter is 150 micrograms per cubic meter g/m3), 24-hour average concentration. The standards are attained when the expected number of days per calendar year with a 24-hour average concentration above 150 g/m3, as determined in accordance with appendix K to this part, is equal to or less than one.

(b) The level of the national primary and secondary annual standards for particulate matter is 50 micrograms per cubic meter g/m3), annual arithmetic mean. The standards are attained when the expected annual arithmetic mean concentration, as deter-mined in accordance with appendix K to this part, is less than or equal to 50 g/m3.

(c) For the purpose of determining attainment of the primary and secondary standards, particulate matter shall be measured in the ambient air as PM10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by:

(1) A reference method based on appendix J and designated in accordance with part 53 of this chapter, or

(2) An equivalent method designated in accordance with part 53 of this chapter.

[52 FR 24663, July 1, 1987, as amended at 62 FR 38711, July 18, 1997; 65 FR 80779, Dec. 22, 2000]

42 U.S.C. Section 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title -

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as -

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as

expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect

until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless -

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated

metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion,

commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3) -

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under

subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) (FOOTNOTE 1) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) (FOOTNOTE 1) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

Footnotes

(FOOTNOTE 1) Section 7413 of this title, referred to in subsec. (e)(3), was amended generally by Pub. L. 101-549, title VII, Sec. 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

42 U.S.C. Section 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator -

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

42 U.S.C. Section 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if -

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality

standard has occurred in the area in the year preceding the Extension Year. No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology)

and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives

such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates

otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. Section 7509a. International border areas

(a) Implementation plans and revisions

Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if -

(1) such plan or revision meets all the requirements applicable to it under the (FOOTNOTE 1) chapter other than a requirement that such plan or revision demonstrate attainment and maintenance of the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, and

(2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, but for emissions emanating from outside of the United States.

(b) Attainment of ozone levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator that, with respect to an ozone nonattainment area in such State, such State would have attained the national ambient air quality standard for ozone by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be subject to the provisions of section 7511(a)(2) or (5) of this title or section 7511d of this title.

(c) Attainment of carbon monoxide levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the

Administrator, with respect to a carbon monoxide nonattainment area in such State, that such State has attained the national ambient air quality standard for carbon monoxide by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be subject to the provisions of section 7512(b)(2) or (9) (FOOTNOTE 2) of this title.

(d) Attainment of PM-10 levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator that, with respect to a PM-10 nonattainment area in such State, such State would have attained the national ambient air quality standard for carbon monoxide by the applicable attainment date, but for emissions emanating from outside the United States, shall not be subject to the provisions of section 7513(b)(2) of this title.

Footnotes

(FOOTNOTE 1) So in original. Probably should be "this".

(FOOTNOTE 2) So in original. Section 7512(b) of this title does not contain a par. (9).

42 U.S.C. Section 7513. Classifications and attainment dates

(a) Initial classifications

Every area designated nonattainment for PM-10 pursuant to section 7407(d) of this title shall be classified at the time of such designation, by operation of law, as a moderate PM-10 nonattainment area (also referred to in this subpart as a "Moderate Area") at the time of such designation. At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each PM-10 nonattainment area, the Administrator shall publish a notice announcing the classification of such area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice-and-comment and judicial review) shall apply with respect to such classification.

(b) Reclassification as Serious

(1) Reclassification before attainment date

The Administrator may reclassify as a Serious PM-10 nonattainment area (identified in this subpart also as a "Serious Area") any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM-10 by the attainment date (as prescribed in subsection (c) of this section) for Moderate Areas. The Administrator shall reclassify appropriate areas as Serious by the following dates:

(A) For areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the Administrator shall propose to reclassify appropriate areas by June 30, 1991, and take final action by December 31, 1991.

(B) For areas subsequently designated nonattainment, the Administrator shall reclassify

appropriate areas within 18 months after the required date for the State's submission of a SIP for the Moderate Area.

(2) Reclassification upon failure to attain

Within 6 months following the applicable attainment date for a PM-10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable attainment date -

(A) the area shall be reclassified by operation of law as a Serious Area; and

(B) the Administrator shall publish a notice in the Federal Register no later than 6 months following the attainment date, identifying the area as having failed to attain and identifying the reclassification described under subparagraph (A).

(c) Attainment dates

Except as provided under subsection (d) of this section, the attainment dates for PM-10 nonattainment areas shall be as follows:

(1) Moderate Areas

For a Moderate Area, the attainment date shall be as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the attainment date shall not extend beyond December 31, 1994.

(2) Serious Areas

For a Serious Area, the attainment date shall be as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section

7407(d)(4) of this title, the date shall not extend beyond December 31, 2001.

(d) Extension of attainment date for Moderate Areas

Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in paragraph (FOOTNOTE 1) (c)(1) if -

(1) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan; and

(2) no more than one exceedance of the 24-hour national ambient air quality standard level for PM-10 has occurred in the area in the year preceding the Extension Year, and the annual mean concentration of PM-10 in the area for such year is less than or equal to the standard level. No more than 2 one-year extensions may be issued under the subsection for a single nonattainment area.

(e) Extension of attainment date for Serious Areas

Upon application by any State, the Administrator may extend the attainment date for a Serious Area beyond the date specified under subsection (c) of this section, if attainment by the date established under subsection (c) of this section would be impracticable, the State has complied with all requirements and commitments pertaining to that area in the implementation plan, and the State demonstrates to the satisfaction of the Administrator that the plan for that area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area. At the time of such application, the State must submit a revision to the implementation plan that includes a demonstration of attainment by the most expeditious alternative date

practicable. In determining whether to grant an extension, and the appropriate length of time for any such extension, the Administrator may consider the nature and extent of nonattainment, the types and numbers of sources or other emitting activities in the area (including the influence of uncontrollable natural sources and transboundary emissions from foreign countries), the population exposed to concentrations in excess of the standard, the presence and concentration of potentially toxic substances in the mix of particulate emissions in the area, and the technological and economic feasibility of various control measures. The Administrator may not approve an extension until the State submits an attainment demonstration for the area. The Administrator may grant at most one such extension for an area, of no more than 5 years.

(f) Waivers for certain areas

The Administrator may, on a case-by-case basis, waive any requirement applicable to any Serious Area under this subpart where the Administrator determines that anthropogenic sources of PM-10 do not contribute significantly to the violation of the PM-10 standard in the area. The Administrator may also waive a specific date for attainment of the standard where the Administrator determines that nonanthropogenic sources of PM-10 contribute significantly to the violation of the PM-10 standard in the area.

Footnotes

(FOOTNOTE 1) So in original. Probably should be "subsection".

42 U.S.C. Section 7513a. Plan provisions and schedules for plan submissions

(a) Moderate Areas

(1) Plan provisions

Each State in which all or part of a Moderate Area is located shall submit, according to the applicable schedule under paragraph (2), an implementation plan that includes each of the following:

(A) For the purpose of meeting the requirements of section

7502(c)(5) of this title, a permit program providing that permits meeting the requirements of section 7503 of this title are required for the construction and operation of new and modified major stationary sources of PM-10.

(B) Either (i) a demonstration (including air quality modeling) that the plan will provide for attainment by the applicable attainment date; or (ii) a demonstration that attainment by such date is impracticable.

(C) Provisions to assure that reasonably available control measures for the control of PM-10 shall be implemented no later than December 10, 1993, or 4 years after designation in the case of an area classified as moderate after November 15, 1990.

(2) Schedule for plan submissions

A State shall submit the plan required under subparagraph (1) no later than the following:

(A) Within 1 year of November 15, 1990, for areas designated nonattainment under section 7407(d)(4) of this title, except that the provision required under subparagraph (1)(A) shall be submitted no later than June 30, 1992.

(B) 18 months after the designation as nonattainment, for those areas designated nonattainment after the designations prescribed under section 7407(d)(4) of this title.

(b) Serious Areas

(1) Plan provisions

In addition to the provisions submitted to meet the requirements of paragraph (FOOTNOTE 1) (a)(1) (relating to Moderate Areas), each State in which all or part of a Serious Area is located shall submit an implementation plan for such area that includes each of the following:

(A) A demonstration (including air quality modeling) -

(i) that the plan provides for attainment of the PM-10 national ambient air quality standard by the applicable attainment date, or

(ii) for any area for which the State is seeking, pursuant to section 7513(e) of this title, an extension of the attainment date beyond the date set forth in section 7513(c) of this title, that attainment by that date would be impracticable, and that the plan provides for attainment by the most expeditious alternative date practicable.

(B) Provisions to assure that the best available control measures for the control of PM-10 shall be implemented no later than 4 years after the date the area is classified (or reclassified) as a Serious Area.

(2) Schedule for plan submissions

A State shall submit the demonstration required for an area under paragraph (1)(A) no later than 4 years after reclassification of the area to Serious, except that for areas reclassified under section 7513(b)(2) of this title, the State shall submit the attainment demonstration within 18 months after reclassification to

Serious. A State shall submit the provisions described under paragraph (1)(B) no later than 18 months after reclassification of the area as a Serious Area.

(3) Major sources

For any Serious Area, the terms "major source" and "major stationary source" include any stationary source or group of stationary sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 70 tons per year of PM-10.

(c) Milestones

(1) Plan revisions demonstrating attainment-submitted to the

Administrator for approval under this subpart shall contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate reasonable further progress, as defined in section 7501(1) of this title, toward attainment by the applicable date.

(2) Not later than 90 days after the date on which a milestone applicable to the area occurs, each State in which all or part of such area is located shall submit to the Administrator a demonstration that all measures in the plan approved under this section have been implemented and that the milestone has been met. A demonstration under this subsection shall be submitted in such form and manner, and shall contain such information and analysis, as the Administrator shall require. The Administrator shall determine whether or not a State's demonstration under this subsection is adequate within 90 days after the Administrator's receipt of a demonstration which contains the information and analysis required by the Administrator.

(3) If a State fails to submit a demonstration under paragraph (2) with respect to a milestone within the required period or if the Administrator determines that the area has not met any applicable milestone, the Administrator shall require the State, within 9 months after such failure or determination to submit a plan revision that assures that the State will achieve the next milestone (or attain the national ambient air quality standard for PM-10, if there is no next milestone) by the applicable date.

(d) Failure to attain

In the case of a Serious PM-10 nonattainment area in which the PM-10 standard is not attained by the applicable attainment date, the State in which such area is located shall, after notice and opportunity for public comment, submit within 12 months after the applicable attainment date, plan revisions which provide for attainment of the PM-10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area.

(e) PM-10 precursors

The control requirements applicable under plans in effect under this part for major stationary sources of PM-10 shall also apply to major stationary sources of PM-10 precursors, except where the Administrator determines that such sources do not contribute significantly to PM-10 levels which exceed the standard in the area. The Administrator shall issue guidelines regarding the application of the preceding sentence.

Footnotes

(FOOTNOTE 1) So in original. Probably should be "subsection".

42 U.S.C. Section 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) (FOOTNOTE 1) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the (FOOTNOTE 2) chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),, (FOOTNOTE 3) the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and

mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) (FOOTNOTE 1) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,,

(FOOTNOTE 3) under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under

paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph

(1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to (FOOTNOTE 4) the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to -

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of -

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the

proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to

promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule

would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including

reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section (FOOTNOTE 5) 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

Footnotes

(FOOTNOTE 1) See References in Text note below.
(FOOTNOTE 2) So in original. Probably should be "this".
(FOOTNOTE 3) So in original.
(FOOTNOTE 4) So in original. The word "to" probably should not appear.
(FOOTNOTE 5) So in original. Probably should be "sections".

No. 01-71902
EPA No. Clean Air Act Northern
District of California, San Francisco

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB,
Petitioner,

IMPERIAL COUNTY AIR
POLLUTION CONTROL DISTRICT,
Intervenor,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al,
Respondents.

February 10, 2003, Filed

ORDER

Before: CANBY, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

Submission of this case is deferred for ten (10) days to permit the parties to file supplemental briefs.

No. 01-71902
EPA No. Clean Air Act Northern
District of California, San Francisco

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB,
Petitioner,

IMPERIAL COUNTY AIR
POLLUTION CONTROL DISTRICT,
Intervenor,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,
Respondents.

February 11, 2003, Filed

AMENDED ORDER

Before: CANBY, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

The order filed February 10, 2003 is amended as follows: Submission of this case is deferred for fifteen (15) from the file date of this order to permit the parties to file simultaneous supplemental briefs not to exceed 25 pages in length. Inter alia the parties shall set forth their views as to the multiplier for 24-hour exceedences as discussed during oral argument.

No. 01-71902
EPA No. Clean Air Act Northern
District of California, San Francisco

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB,
Petitioner,

IMPERIAL COUNTY AIR
POLLUTION CONTROL DISTRICT,
Intervenor,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; CHRISTINE
TODD WHITMAN,
Respondents.

February 21, 2003, Filed

ORDER

Before: CANBY, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

Petitioner Sierra Club's motion for an extension of time to file supplemental briefing is GRANTED. The parties will file their briefs by March 5, 2003.

(2)

Supreme Court, U.S.
FILED
MAY 2 1 2004
OFFICE OF THE CLERK

No. 03-1334

In The Supreme Court of the United States

IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT,

Petitioner,

v.

SIERRA CLUB,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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May 21, 2004

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals properly ruled, based on the specific record before it and applying the standards of review established by this Court, that EPA acted arbitrarily and capriciously in waiving reclassification of Imperial Valley to "serious" nonattainment for particulate pollution.

2. Whether the court of appeals properly directed EPA to reclassify Imperial Valley to "serious" nonattainment on remand, where the Clean Air Act expressly mandated such reclassification absent a valid waiver, the reclassification was already more than eight years overdue, and the record did not support further consideration of a waiver on remand.

DISCLOSURE STATEMENT

Sierra Club has no parent companies, and there are no publicly-held companies owning any stock in Sierra Club. Sierra Club is a national nonprofit organization incorporated in California and dedicated to the protection and enjoyment of the environment.

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COUNTERSTATEMENT

The Imperial Valley Planning Area (Imperial Valley) has long violated federal health standards for airborne particulate matter (PM-10), a form of pollution linked to premature deaths and other severe health impacts. 40 C.F.R. § 81.305 (2003 and prior versions); 66 Fed. Reg. 5002, 5018, 5021 (2001). When Imperial Valley failed to attain the PM-10 standards by 1994, the Clean Air Act (the Act) mandated that the area be reclassified from "moderate" to "serious" nonattainment for PM-10, a step that would trigger stronger pollution control requirements. 42 U.S.C. § 7513(b)(2), (c)(1); Appendix to Petition for Writ of Certiorari (Pet. App.) 66a. Section 179B(d) of the Act allowed EPA to waive reclassification only if the state showed that the area would have timely attained standards "but for" emissions from outside the United States. 42 U.S.C. § 7509a(d). Thus, to meet the test, the state had to show that each and every violation in Imperial Valley as of the attainment deadline would not have occurred but for foreign emissions – in this case emissions from Mexico to the south. Pet. App. 11a-12a.

Here, the court of appeals found that EPA acted arbitrarily and capriciously in waiving reclassification of Imperial Valley under § 179B(d), when the record showed that PM-10 violations occurred in Imperial Valley even when there was no evidence of pollution transport from Mexico. Undisputed evidence in the record showed that violations occurred at Brawley, more than 20 miles north of the border, on days when the air was stagnant, when what little wind there was came predominantly from the west, when PM-10 levels were actually lower at locations closer to border, and when there was no evidence whatsoever of any actual transport of pollution from Mexico. Pet.

App. 10a-13a, 53a-55a. Although there were very slight west-southwesterly winds for parts of these days, the only source of Mexican emissions identified by EPA – the city of Mexicali – is south-southeast of Brawley, not west-southwest. Pet. App. 10a-13a.

The court of appeals expressly acknowledged that it owed "significant" deference to EPA's technical judgment (Pet. App. 9a), but concluded, after carefully reviewing the record (including the wind data cited by Petitioner), that the agency's finding of "but for" causation on these days ran counter to the evidence in the record. Pet. App. 9a-13a. The court therefore found that EPA's action was arbitrary and capricious under well-settled standards of review established by this Court. *Id.*, *citing, inter alia, Motor Vehicle Mfrs Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where based on "clear error of judgment" or an explanation that "runs counter to the evidence before the agency"), and *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) (courts do not defer to agency decision that "is without substantial basis in fact").

Given that the record simply did not support a finding that Mexican emissions caused all of the violations in Imperial Valley, the court vacated EPA's action and remanded with instructions for EPA to reclassify the area from "moderate" to "serious" as expressly mandated by the Act. Pet. App. 13a-14a. The court found that no useful purpose would be served by yet another round of administrative proceedings because the record was already fully developed and the conclusions that must follow from it were clear. *Id.* Earlier in its opinion, the court had noted the long history of delay in implementing the Act's requirements in Imperial Valley. *Id.* 6a. At the time of the

court's remand order, reclassification of Imperial Valley to "serious" was already more than eight years overdue. 42 U.S.C. §§ 7513(b)(2), (c)(1). The agency had taken no action when the area missed its 1994 attainment deadline, and only acted in 2001 after being sued by Sierra Club. Pet. App. 6a-7a. The consent decree entered in that suit required EPA to make a reclassification determination for Imperial Valley by October 9, 2001, unless EPA granted a § 179B waiver by then (or took other action not relevant here). ER 165.[1] At the time it proposed to grant the § 179B waiver for Imperial Valley, EPA itself specifically proposed in the alternative to reclassify the area to "serious" if it was determined that the State had not made an adequate § 179B demonstration. Pet. App. 20a-21a.

EPA did not petition for rehearing in the court of appeals, and has not petitioned this Court for a writ of certiorari in this case.

REASONS FOR DENYING THE PETITION

The court of appeals correctly stated and applied well-settled principles of administrative law in finding that EPA's waiver decision here was arbitrary and capricious. The court expressly recognized its duty to give significant deference to EPA technical judgments while also ensuring that the agency's decision had a "substantial basis in fact" and did not run "counter to the evidence." Petitioner's disagreement with the court of appeals' application of

[1] "ER" refers to Petitioner's Excerpts of Record in the Ninth Circuit.

these principles to the specific facts at issue here is unsupported by the record, and in any event does not present a matter warranting this Court's attention. Sup. Ct. R. 10 (certiorari "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Likewise, the court of appeals' remand instructions were fully justified by the record and circumstances of this case, and were consistent both with this Court's precedent and remand instructions issued by other circuits.

I. THE COURT OF APPEALS CORRECTLY HELD THAT EPA'S WAIVER ACTION WAS ARBITRARY AND CAPRICIOUS

Contrary to Petitioner's claims, the court of appeals was fully cognizant of its duty to give substantial deference to EPA's technical judgment. At the very outset of its analysis, the court expressly "recognize[d] that where, as here, a court reviews an agency action 'involving primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' we must 'defer to the informed discretion of the responsible federal agencies.'" Pet. App. 9a, *quoting Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). The court further acknowledged that "'a reviewing court must generally be at its most deferential'" when examining an agency's scientific determinations. Pet. App. 9a, *quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). The court of appeals also recognized, however, that an agency decision must still have a "'substantial basis in fact,'" and that a reviewing court is obliged to "'consider whether the [agency] decision was based on a consideration of the relevant factors and

whether there has been a clear error of judgment.'" Pet. App. 9a, *quoting Federal Power Comm'n*, 404 U.S. at 463, and *State Farm*, 463 U.S. at 43. The court also noted that, under this Court's precedent, an agency action is arbitrary and capricious where its rationale "'runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Pet. App. 10a, *quoting State Farm*, 463 U.S. at 43. Petitioner does not and cannot claim that the court of appeals misstated these well-settled principles of administrative law, all of which come directly from decisions of this Court.

The court of appeals properly applied these principles in holding that EPA's waiver decision was arbitrary and capricious. The court carefully reviewed the record and concluded that EPA's finding of "but for" causation simply ran "counter to the evidence" and was "so implausible" that it could not withstand scrutiny. EPA's theory was that all PM-10 violations in Imperial Valley were caused by PM-10 pollution blown into Imperial Valley from Mexicali, Mexico. Pet. App. 27a-28a. The undisputed data in the record showed, however, that on at least two days when significant PM-10 violations occurred at Brawley (21 miles north-northwest of Mexicali), the air was stagnant, and what little wind there was came predominantly from the west or west-southwest. Pet. App. 10a-13a, 53a-55a. EPA did not and could not explain how such west or west-southwesterly winds could conceivably carry PM-10 north-northwest from Mexicali to Brawley. Moreover, the data for these days showed *higher* PM-10 levels at Brawley than at points south (closer to Mexicali), which under EPA's own theory refuted the premise of transport from

Mexico. Pet. App. 10a-11a, 27a; ER 34. EPA was completely unable to reconcile the theory of "but for" causation with all of the foregoing, although the court gave the agency multiple opportunities to do so – at oral argument, and again by allowing the filing of supplemental briefs.[2] Pet. App. 11a. Nor was EPA able to quantify the transport of any PM-10 from Mexico to Imperial Valley at any time. Pet. App. 78a.

The court of appeals thus correctly concluded that EPA's decision could not withstand even a highly deferential standard of review. This was not a matter of the court conducting a de novo review or substituting its judgment for the agency's, but of the agency being unable to offer a plausible rationale that could reconcile the record with a finding of "but for" causation.

Contrary to Petitioner's assertion, the court did in fact consider EPA's other stated bases for decision (Pet. App. 6a-8a), as well as the agency's § 179B guidance document (which by its terms was "preliminary" and nonbinding, Pet. App. 93a). Pet. App. 4a-6a. It was undisputed, however, that to qualify for a § 179B waiver, the state had to show that *none* of the violations in Imperial Valley would have occurred but for emissions from Mexico. *Id.* 11a-12a. Having properly determined that the record simply did not support such a showing for the two specific violation days

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[2] Petitioner complains that the court did not consider certain rainfall data, but EPA itself never deemed that evidence relevant or probative, and it is on the agency's rationale that EPA's action must stand or fall. *State Farm*, 463 U.S. at 50.

in Brawley, there was simply no need for the court to conduct an in-depth review of data for other days.

II. THE COURT OF APPEALS' REMAND INSTRUCTIONS WERE PROPER

Although the normal course of action when the record fails to support an agency's decision is to remand for additional investigation or explanation, this Court's precedent acknowledges the propriety of remanding with instructions in exceptional cases. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Citing that precedent, the court of appeals properly found that this was one of those special cases warranting remand instructions. The record was already fully developed, and EPA had been unable to offer any plausible explanation of that record that would justify a waiver of reclassification. This was not a situation where remand for further deliberations might serve some useful purpose. To the contrary, EPA took that position that the state had already offered its best possible case for a waiver given available information, and that it was "not now possible" to create additional information from new studies. Pet. App. 76a-77a.

Moreover, at the time of the court's decision, reclassification of Imperial Valley to "serious" as mandated by the Act was already more than *eight years* overdue. 42 U.S.C. § 7513(b)(2). The District Court had previously ordered EPA to take reclassification action for the area by October 2001 absent a § 179B(d) waiver. EPA *itself* had expressly proposed reclassification as the alternative to such a waiver. Pet. App. 20a-21a. Indeed, where an area has missed its attainment deadline, the Act requires reclassification "by operation of law" – it is not a matter for EPA

discretion. 42 U.S.C. § 7513(b)(2)(A). Given this unique statutory and procedural context, and the history of extraordinary EPA delay, the court was fully justified in instructing EPA to proceed with the already long-overdue reclassification.[3] A remand for yet another round of waiver deliberations would have served only to further nullify the Act's precise timetables and requirements for remedying PM-10 pollution in Imperial Valley. *See Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 481-86 (2001) (stressing importance of adherence to express antipollution mandates in 42 U.S.C. §§ 7511-7511f [which encompass the PM-10 deadlines and reclassification requirements]).

Contrary to Petitioner's claims, reclassification to "serious" will not impose unusual or undue burdens on Imperial Valley, but rather will simply require the area to adopt the same level of pollution control *already* required in a number of communities that have long been classified as "serious" for PM-10. These include the Coachella Valley (immediately north of Imperial Valley), Los Angeles, the San Joaquin Valley, Reno, and Phoenix. 40 C.F.R. §§ 81.303, .305, .329 (2003). Moreover, § 179B(d) is not the only avenue of relief for border areas impacted by foreign pollution. Section 188(e) of the Act allows EPA to extend the attainment deadline for "serious" PM-10 areas based on consideration of a variety of factors, including impacts

[3] This case is therefore readily distinguishable from *INS v. Ventura*, 537 U.S. 12 (2002), a case where the circuit court's remand order relied on a new theory not previously considered by the agency, and where both sides agreed that further deliberations were needed on remand. Nor is there any claim here of recurring error in the scope of Ninth Circuit remand orders to EPA – as was claimed in *Ventura* with respect to INS cases. 537 U.S. at 16.

from transboundary pollution, without requiring a showing of "but for" causation. 42 U.S.C. § 7513(e).

III. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS

There is no conflict among the circuits that would militate in favor of granting certiorari in this matter. The administrative law principles stated and applied by the Ninth Circuit match those regularly used in all circuits. Moreover, the level of scrutiny given by the Ninth Circuit to EPA's action here is consistent with that applied in other circuits.[4] Similarly, the Ninth Circuit's statement of

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[4] *E.g.*, *Public Citizen v. Mineta*, 340 F.3d 39 (2d Cir. 2003) (holding arbitrary and capricious DOT rejection of more protective tire monitoring systems for new cars); *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998) (reversing agency finding where record did not support it); *Chemical Mfrs Ass'n v. EPA*, 28 F.3d 1259 (D.C. Cir. 1994) (overturning EPA listing of pollutant as "high risk" based on a model that the court found unsupportive); *Monsanto Co. v. EPA*, 19 F.3d 1201 (7th Cir. 1994) (reversing EPA decision that was based on technical conclusions not supported by the record); *Bell Petroleum Svcs. v. Sequa Corp.*, 3 F.3d 889, 904-06 (5th Cir. 1993) (holding that record did not support EPA decision to furnish alternative drinking water supply to Superfund site); *United States v. F/V Alice Amanda*, 987 F.2d 1078 (4th Cir. 1993) (holding arbitrary and capricious fishery agency finding that was "clearly at variance with established facts"); *Rocky Mountain Helicopters v. FAA*, 975 F.2d 736 (10th Cir. 1992) (reversing FAA safety requirement that record showed was unnecessary); *Audubon Society of Central Arkansas v. Dailey*, 977 F.2d 428 (8th Cir. 1992) (agency action reversed where record "gave every reason to doubt" agency's finding); *Ohio v. EPA*, 784 F.2d 224 (6th Cir. 1986) (holding EPA reliance on unvalidated model to be arbitrary and capricious); *NRDC v. EPA*, 790 F.2d 289, 305-306 (3d Cir. 1986) (rejecting EPA technical rationale that ran counter to the evidence before the agency); *Sierra Club v. Marsh*,

(Continued on following page)

the law governing remand instructions can hardly create a conflict with other circuits, as it comes directly from this Court's precedent. Pet. App. 13a, *quoting Florida Power & Light*, 470 U.S. at 744. The decision on whether a particular case warrants broader than usual remand instructions is necessarily a fact-specific one, but the Ninth Circuit's remand instructions in this case are well within the range of those issued by other circuits.[5] Indeed, the Seventh Circuit recently entered a virtually identical remand order in *Sierra Club v. EPA*, 311 F.3d 853, 862 (7th Cir. 2002) (remanding to EPA with instructions to immediately reclassify St. Louis as a "serious" nonattainment area).

IV. NO OTHER FACTORS MAKE THIS CASE WORTHY OF THE COURT'S ATTENTION

This case does not present any other issues of federal law warranting this Court's review. Rather, Petitioner merely raises a highly fact-specific disagreement with the court of appeals' conclusion that, on the particular record before it, EPA's action was arbitrary and capricious. Nor

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769 F.2d 868 (1st Cir. 1985) (record refuted agency's finding that project would have no significant impact on the environment).

[5] *E.g.*, *Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 261 (D.C. Cir. 1993) (in addition to vacating unlawful EPA decision not to regulate, court ordered promulgation of regulations); *Audubon Soc'y*, 977 F.2d at 436-37 (agency directed to prepare environmental impact statement on remand); *Marsh*, 769 F.2d at 882 (same); *Connecticut Fund for the Environment v. EPA*, 672 F.2d 998, 1009 n.24, 1014 (2d Cir. 1982) (directing EPA to issue revised order to reimpose construction ban on remand); *Natural Resources Defense Council v. EPA*, 478 F.2d 875, 888-91 (1st Cir. 1973) (directing EPA on remand to promulgate federal clean air plans).

does this case implicate any other matters of pressing or substantial concern warranting this Court's attention.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
MAY 2 1 2004
OFFICE OF THE CLERK

No. 03-1334

In the Supreme Court of the United States

IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT, PETITIONER

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding arbitrary and capricious the finding of the Environmental Protection Agency (EPA) that the State of California had established that the Imperial Valley Planning Area's nonattainment of the national ambient air quality standards for particulate matter of 10 microns or less by the applicable attainment date under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, was due to emissions from sources in Mexico.

2. Whether the court of appeals erred in remanding EPA's finding to the Agency with instructions that the Imperial Valley Planning Area be reclassified from a moderate to a serious nonattainment area.

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In the Supreme Court of the United States

No. 03-1334

IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT, PETITIONER

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 346 F.3d 955, and the amendment to the opinion (Pet. App. 17a-19a) is reported at 352 F.3d 1186.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2003, and amended on December 18, 2003. A petition for rehearing was denied on December 18, 2003 (Pet. App. 17a-19a). The petition for a writ of certiorari was filed on March 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks review of a decision of the court of appeals arising from rulemaking under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, by the United States Environmental Protection Agency (EPA). EPA promulgated a rule pursuant to CAA Section 179B(d), 42 U.S.C. 7509a(d), in which the agency found that California had established to EPA's satisfaction that, but for wind-borne emissions of particulate matter of 10 microns or less (PM-10) emanating from the bordering nation of Mexico, the Imperial Valley Planning Area (Imperial County) would have attained CAA standards for PM-10 by the applicable attainment date. Pet. App. 65a-91a. As a result of that determination, Imperial County was not subject to a finding that it had failed to attain the PM-10 standards and thus was not reclassified from a "moderate" to a "serious" non-attainment area under CAA Section 188(b)(2), 42 U.S.C. 7513(b)(2). Pet. App. 65a.

The Sierra Club petitioned for review, challenging EPA's rule, and the court of appeals granted the petition and remanded with instructions that EPA reclassify Imperial County from a moderate to a serious nonattainment area. Pet. App. 1a-16a. Petitioner Imperial County Air Pollution Control District petitioned for rehearing and moved to stay the mandate pending filing of the petition herein. *Id.* at 18a-19a.[1] The court of appeals denied rehearing but granted the stay. *Ibid.*

1. The CAA establishes a comprehensive program for controlling and improving the nation's air quality through

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[1] Petitioner is the local governmental agency charged with administering and enforcing the requirements of various air quality laws, including the CAA, in Imperial County. Pet. App. 3a. Petitioner was an intervenor-respondent below.

both state and federal regulation. Under the CAA, EPA is directed to set National Ambient Air Quality Standards (NAAQS) for air pollutants at levels requisite to protect public health and welfare. 42 U.S.C. 7408-7409. EPA promulgated NAAQS for various pollutants, including PM-10. See 40 C.F.R. Pt. 50. The PM-10 NAAQS relevant here requires that PM-10 in ambient air in a given area of the United States not exceed the regulatorily prescribed level for more than one day per year. 40 C.F.R. 50.6(a).

The States have primary responsibility for ensuring compliance with the NAAQS. 42 U.S.C. 7407(a). Once EPA promulgates a NAAQS, each State must formulate a state implementation plan (SIP) that provides for the attainment, maintenance, and enforcement of the NAAQS. 42 U.S.C. 7410(a). Each State's SIP is subject to EPA's review and approval. 42 U.S.C. 7410(a)(2).

EPA designated areas of the country as "attainment" or "nonattainment," based on whether each area satisfied the PM-10 NAAQS. 42 U.S.C. 7407(d). EPA is required to classify PM-10 nonattainment areas as "moderate" or "serious." 42 U.S.C. 7513. All PM-10 nonattainment areas were initially designated as "moderate" and were required to achieve attainment by December 31, 1994. 42 U.S.C. 7513(a) and (c). If attainment was not achieved by that date, then EPA was to reclassify the nonattainment area as "serious" and to require that the nonattainment area impose more stringent controls on sources of pollution and achieve attainment by December 31, 2001. 42 U.S.C. 7513 (b)-(c).

CAA Section 179B(d), 42 U.S.C. 7509a(d), provides an exception to reclassification. Under Section 179B(d), if a State establishes to EPA's satisfaction that a nonattainment area would have timely attained the PM-10 NAAQS "but for emissions emanating from outside the United

States," then the nonattainment area will not be reclassified from "moderate" to "serious." 42 U.S.C. 7509a(d); see 42 U.S.C. 7513(b)(2). In 1994, EPA issued administrative guidance (EPA Guidance) setting forth suggested information and methods for evaluating the impact on a PM-10 nonattainment area of emissions emanating from sources in a country bordering the United States.[2] Pet. App. 4a-5a.

2. Imperial County is located in southeastern California, and shares approximately 80 miles of border with Mexico. Pet. App. 2a-3a. The County was classified as a moderate PM-10 nonattainment area and was required to attain the NAAQS by December 31, 1994. *Id.* at 4a. During the period 1992-1994, the PM-10 standards were exceeded at various monitoring stations in the County on seven days. *Id.* at 26a. EPA, however, took no action to reclassify Imperial County. In 2000, respondent Sierra Club filed suit in the United States District Court for the

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[2] See *State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990*, 59 Fed. Reg. 41,998 (1994).

The EPA Guidance identifies five examples of information and methodology that may be used: (1) monitoring PM-10 levels and wind speed and direction near the border, and correlating changes in PM-10 levels with changes in wind direction; (2) inventorying domestic PM-10 emissions in the nonattainment area's vicinity and demonstrating that those emissions did not cause exceedance of the PM-10 NAAQS; (3) analyzing ambient sample filters for specific types of particles emanating from the bordering country; (4) comparing inventories of PM-10 emission sources, and the relative magnitude of PM-10 emissions, for foreign and domestic sources; and (5) performing air dispersion or receptor modeling to quantify the relative impact of domestic and foreign sources of PM-10 on the nonattainment area. Pet. App. 5a-6a.

District of Columbia, seeking to compel EPA to reclassify the County as a serious nonattainment area. That suit was resolved by a consent decree, in which EPA agreed to make a reclassification determination for the County by October 9, 2001. *Id.* at 6a.

In August 2001, EPA issued a proposed rule that included two possible alternatives. Pet. App. 20a-64a. Under the first alternative, EPA proposed to find that California had established to EPA's satisfaction that, but for wind-borne emissions emanating from Mexico, Imperial County would have attained the PM-10 NAAQS by December 31, 1994, and therefore should not be reclassified. *Id.* at 24a-33a. Under the second alternative, EPA proposed to find that Imperial County failed to attain the NAAQS and should be reclassified. *Id.* at 33a-37a.

The first alternative, which EPA ultimately adopted in its final rule, was based on petitioner's July 2001 "Imperial County PM-10 Attainment Demonstration" (Attainment Demonstration). Pet. App. 24a. Consistent with the EPA Guidance, the Attainment Demonstration contained data from various sources, including PM-10 monitors located in Imperial County, spatial plots, wind roses, back trajectories, and a model based on an inventory of emissions sources in the County.[3] *Id.* at 26a-31a.

With respect to the PM-10 monitors, EPA proposed to conclude that, for five of the seven days that the PM-10 NAAQS was exceeded, "the analysis clearly supports the conclusion that but for the transport of emissions from

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[3] Spatial plots reflect the concentration of PM-10 measurements at various monitoring stations in a given area. Pet. App. 15a n.7. A windrose diagram shows the percentage of time that wind blows from each compass direction for various ranges of wind speed. *Id.* at 15a n.8. A back trajectory is a map that, by measuring wind speed and direction a certain distance above the ground, shows the most likely source of a given parcel of air that hits a monitor. *Id.* at 15a n.9.

Mexico, the PM-10 concentrations would not have exceeded the standard." Pet. App. 27a. The other two exceedances occurred on January 19 and 25, 1993, at the Brawley monitoring station twenty-one miles north of the County's border with Mexico. *Ibid.*[4] The proposed findings noted that "there are less data on which to base an analysis" for those two days. *Ibid.* Nonetheless, in light of the "magnitude of emissions in the City of Mexicali" just south of the border, the proposed finding concluded that "[t]he emissions from Mexico are likely to have contributed to the PM-10 concentration at the monitor, although it is difficult to precisely quantify the extent of the contribution." *Ibid.* See also *id.* at 54a ("[G]iven the number of hours with a southerly wind direction, and the closeness of the exceedance to the standard, it is likely that, but for transport from Mexico, [the January 19] exceedance would not have occurred."); *id.* at 55a (similar for January 25 exceedance).

The Sierra Club submitted adverse comments on the proposed rule, contending, *inter alia*, that California failed to show that Imperial County's exceedances of the PM-10 NAAQS on January 19 and 25, 1993, were caused by emissions from Mexico. See Pet. App. 75a-76a. EPA promulgated a final rule on October 19, 2001, finding that California had made the requisite showing under CAA Section 179B(d) and thus Imperial County would not be reclassified. *Id.* at 65a-91a.

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[4] Adjusting the two actual exceedances to account for days not sampled, 40 C.F.R. Pt. 50, App. K, established that the expected number of exceedances was 4.3 days per year, which is above the regulatory standard of one day per year and would ordinarily require reclassification as a serious nonattainment area. Pet. App. 11a; see 40 C.F.R. 50.6(a).

With respect to the PM-10 exceedances, the final rule concluded that "given the available information," the State's analysis "of spatial plots, wind roses, and back trajectories provides the best determination of PM-10 emissions transport from Mexico." Pet. App. 76a-77a. EPA recognized that one study—the "Imperial Valley/ Mexicali Cross Border PM-10 Transport Study"—had analyzed the air quality and wind direction and speed on the days on which the NAAQS had been exceeded, including January 19 and 25, 1993, and found the air stagnant on those days. *Id.* at 77a. But EPA concluded that "the State's demonstration uses more meteorological data and finds evidence that transport [of PM-10] from Mexico is likely even with the stagnant conditions at the surface." *Ibid.* Although EPA "concede[d] that informa-tion is not available to determine with confidence the exact quantity of PM-10 coming from Mexico," EPA found that "the State has diligently collected and analyzed available evidence and has successfully demonstrated for each of the exceedance days the probability that Imperial County would not have violated the NAAQS but for the emissions emanating from Mexico." *Id.* at 78a.

3. Pursuant to CAA Section 307(b)(1), 42 U.S.C. 7607(b)(1), the Sierra Club petitioned for review of EPA's final rule, raising the same challenges to EPA's decision as in its comments. Pet. App. 8a. The court of appeals granted the petition and remanded with instructions that Imperial County be reclassified as "serious." *Id.* at 14a.

The court of appeals recognized that where "a court reviews an agency action 'involving primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' we must 'defer to the informed discretion of the responsible federal agencies.' " Pet. App. 9a (quoting *Marsh* v. *Oregon Natural Res.*

Council, 490 U.S. 360, 377 (1989)). The court also concluded, however, that it "may not defer to an agency decision that 'is without substantial basis in fact.' " *Ibid.* (quoting *Federal Power Comm'n* v. *Florida Power & Light Co.*, 404 U.S. 453, 463 (1972)).

Having articulated those standards, the court inquired whether the record supported the conclusion that the exceedances of the PM-10 standard on January 19 and 25, 1993, at the Brawley monitors were caused by emissions from Mexico. The court concluded that the record showed that on the days PM-10 exceedances were recorded at the Brawley monitors, the winds in the County were blowing, not from Mexico, but from another direction. Pet. App. 12a-13a. The court found that "EPA's notion of what constitutes a southerly wind [*i.e.*, a wind from Mexico] is, at the least, expansive and, at most, positively incorrect." *Id.* at 12a. Moreover, the court found that even if there were a southerly component in the wind on those days, it would be "of the west-southwesterly variety and thus does not support [EPA's] theory of transport from Mexico." *Id.* at 13a. Finally, the court stated that, in its view, the record also showed that County monitoring stations located between the Brawley monitors and Mexico (and thus closer to Mexico), rather than showing similar exceedances, recorded much lower PM-10 levels than the Brawley monitors. *Id.* at 10a-11a.

Based on its review of the record, the court concluded that "there simply [was] no possibility that Mexican transport could have caused the observed PM-10 exceedances" on the two days. Pet. App. 13a. The court determined that, "[a]lthough the normal course of action when the record fails to support an agency's decision 'is to remand to the agency for additional investigation or explanation,' " *ibid.* (quoting *Florida Power & Light Co.* v.

Lorion, 470 U.S. 729, 744 (1985)), this was an "exceptional case" in which a remand with instructions was appropriate. The court stated that it "fail[ed] to see how further administrative proceedings would serve a useful purpose; the record here has been fully developed, and the conclusions that must follow from it are clear." *Id.* at 13a-14a. Accordingly, the court remanded with instructions "that the EPA classify Imperial Valley as a 'serious' nonattainment area." *Id.* at 14a.

ARGUMENT

The decision of the court of appeals, although incorrect, was primarily based on an analysis of the particular, highly technical facts of this case. It does not conflict with any decision of this Court or any other court of appeals, and it presents no issue of exceptional importance. Further review is therefore unwarranted.

1. The court of appeals' primary conclusion—that the record was insufficient to support EPA's conclusion that the January 19 and 25 exceedances were caused by transport of PM-10 emissions from Mexico—was mistaken. Because reliable PM-10 emissions data from Mexico were not available, EPA was not able precisely to quantify those emissions and track their exact course to monitors in Imperial County. Pet. App. 27a, 78a. Nonetheless, the city of Mexicali just south of the border is a very substantial source of PM-10, with emissions estimated to be equal to the total for all of Imperial County. *Id.* at 29a. In addition, EPA noted that the amount of the exceedances—162 micrograms per cubic meter on January 19 and 175 on January 25, as compared with the NAAQS of 150—were slight. Finally, EPA concluded in its initial analysis, which formed the basis for its final rule, see *id.* at 76a-78a, that there was some wind from a southerly direction on the two days. *Id.* at 53a, 54a.

EPA is entitled to substantial deference on highly technical factual issues of this sort. The statute expressly recognizes the need to grant EPA deference by requiring the State to make a showing only "to the satisfaction of the Administrator" that the NAAQS would have been satisfied absent "emissions emanating from outside the United States." 42 U.S.C. 7509a(d). Especially in light of that highly deferential standard, the court of appeals erred in overturning EPA's determination that the exceedances were caused by transport of PM-10 from Mexico.

2. Although the court of appeals erred in concluding that the record in this case was insufficient to support EPA's conclusion that emissions from Mexico caused the PM-10 exceedances on January 19 and 25, further review of that conclusion is not warranted. The court of appeals correctly identified the governing legal standard. The court noted that "where, as here, a court reviews an agency action 'involving primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' [the court] must 'defer to the informed discretion of the responsible federal agencies.' " Pet. App. 9a (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)); see *ibid.* (quoting *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council*, 462 U.S. 87, 103 (1983), for the proposition that "[w]hen examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential"). As the court of appeals recognized, however, if "the agency offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," then the court may correct the agency's "clear error of judgment." *Id.* at 10a (quoting *Motor*

Vehicle Mfrs. Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Because the court started from those correct legal premises governing the standard of review in cases of this sort, petitioner is mistaken in contending (Pet. 26) that "[a]llowing the decision below to stand would pose a grave threat to decades of jurisprudence founded on the basic principle of judicial respect for agency expertise." The decision of the court of appeals rests primarily on the court's conclusion that, "[b]ased on the data and the reports in the record, there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedances on January 19 and January 25." Pet. App. 13a. Although that analysis of the facts is mistaken, the mistake is rooted in the highly technical factual record in this particular case, and the effect of the court's decision is likely to be similarly limited. Further review is therefore not warranted.

3. In addition to concluding that EPA had erred in concluding that the January 19 and 25 exceedances were caused by PM-10 emissions from Mexico, the court of appeals took the unusual step of remanding with instructions "that the EPA classify Imperial Valley as a 'serious' nonattainment area." Pet. App. 14a. That disposition was error. Nonetheless, because that error too is largely fact-based and limited to the particular situation present in this case, further review of the court's determination to remand with instructions is not warranted.

a. This Court has explained that "[i]f the record before the agency does not support the agency action, * * * the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Therefore, even if the court of appeals were correct

that EPA had erred in concluding that there was sufficient evidence of winds blowing from the direction of Mexico to support the conclusion that transport of PM-10 emissions from Mexico had caused the exceedances on January 19 and 25, the court of appeals should have remanded the case to EPA. In that way, the agency could have made the two vital remaining determinations in this case with the benefit of the court of appeals' conclusion that its analysis of the wind direction data had been mistaken. First, the agency could have determined whether the remaining data in the record were sufficient to support the State's conclusion that the emissions on January 19 and 25 had been caused by transport of PM-10 from Mexico. Second, the agency could have determined whether reopening the proceedings to allow for further development of the record was appropriate. Both of those determinations should have been made in the first instance by the agency and not by the court.

b. Although the court of appeals should have allowed the agency, in the first instance, to reevaluate its decision in view of the court's rejection of its initial determination, the court's error was again largely factual. If the court of appeals were correct that "there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedances on January 19 and 25," Pet. App. 13a, then the court's failure to allow the agency to re-examine the record in the first instance on remand would be of no significance. Indeed, petitioner's argument that the court of appeals' instruction on remand was erroneous is based on the premise (Pet. 30) that "the totality of record evidence * * * more than adequately supports EPA's expert decision that Mexican PM-10 emissions provided *at least* that small amount of influence necessary to cause the slight ex-ceedances observed." Further review is not

warranted to resolve the question whether petitioner or the court of appeals is correct about that premise.

Moreover, it is unlikely that a remand would have led the agency to reopen the proceedings in this case to permit further development of the facts. The parties had a full opportunity to develop the administrative record in this case, and the court of appeals' decision turned on particular historical events that occurred in January 1993, almost ten years before the court of appeals' decision. In those circumstances, it is doubtful that the agency would have found it useful to reopen the record to uncover new facts that could influence the outcome in this case. Petitioner itself does not identify any further useful data that likely could have been obtained through further investigation. For that reason as well, the court of appeals' failure to permit further development of the record in this case was of limited significance.

c. Petitioner contends (Pet. 28-29) that the court of appeals' decision conflicts with this Court's decision in *Immigration & Naturalization Service* v. *Ventura*, 537 U.S. 12 (2002) (*per curiam*). In that case, the court of appeals had reversed a determination of the Board of Immigration Appeals (BIA) that an alien did not qualify for political asylum because he had not faced persecution when he left his home country "on account of" a political opinion. *Id.* at 13. Having reached that conclusion, the court of appeals went on to decide an issue that the BIA had not reached—whether "conditions in [the home country] had improved to the point where no realistic threat of persecution currently existed." *Ibid.* The court of appeals held that the conditions had not so improved. This Court reversed, holding that because "[t]he BIA has not yet considered the 'changed circumstances' issue," the court of appeals "committed clear error" in making that deter-

mination itself in the first instance. *Id.* at 17. The court of appeals should have "giv[en] the BIA the opportunity to address the matter in the first instance in light of its own expertise." *Ibid.*

The Court's holding in *Ventura* is inapplicable here. The issue the court of appeals decided in framing its remand—whether the record supported a conclusion that the two exceedances were caused by PM-10 transported from Mexico—was not one that EPA had not yet had the chance to address, as in *Ventura.* To the contrary, EPA had considered and ruled on that issue in the decision under review. Although, as argued above, the court of appeals erred in reversing EPA's determination on that issue, the court's error has little to do with the error identified in *Ventura.*[5]

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[5] The other two decisions of this Court cited by petitioner (Pet. 26 n.8) are also inapposite. In *Immigration & Naturalization Service* v. *Yi Quan Chen*, 537 U.S. 1016 (2002), the Court simply issued an order vacating and remanding the lower court's decision for further consideration in light of *Ventura.* In *Immigration & Naturalization Service* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), the Court held that the court of appeals erred in finding that a decision of the BIA was not "supported by reasonable, substantial, and probative evidence on the record considered as a whole" under 8 U.S.C. 1105a(a)(4) (1994) (repealed by Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. C, Tit. III, § 306(b), 110 Stat. 3009-612). The Court's decision had nothing to do with the circumstances under which a court may remand a case to an agency with specific instructions after finding, as the court did here, that the agency had erred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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